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Boston

1864

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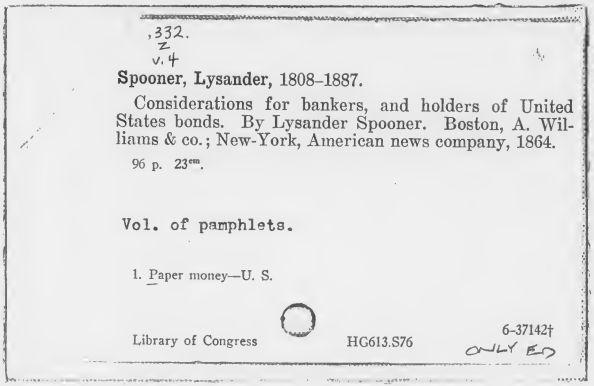

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With regards L. L. Spooner
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# CONSIDERATIONS

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THE REFORM CLUB
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52 William St., New York.

FOR

# BANKERS,

AND

# HOLDERS OF UNITED STATES BONDS.

BY LYSANDER SPOONER.

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BOSTON:
A. WILLIAMS & CO., 100 WASHINGTON STREET.
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1864.

Entered according to Act of Congress, in the year 1864,
BY LYSANDER SPOONER,
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# CONSIDERATIONS

FOR

# BANKERS.

## CHAPTER I.

### EXPLANATION OF THE AUTHOR'S NEW SYSTEM OF PAPER CURRENCY.

THE principle of the system is, that the currency shall represent an *invested* dollar, instead of a specie dollar.

The currency will, therefore, be redeemable, *in the first instance*, by an invested dollar, unless the bankers *choose* to redeem it with specie.

The capital is made up of a given amount of property deposited with trustees.

This capital is never diminished; but is liable to pass into the hands of new holders, in redemption of the currency, if the trustees fail to redeem the currency with specie.

The amount of currency is precisely equal to the nominal amount of capital.

When the currency is returned for redemption, (otherwise than in payment of debts due the bank,) and the trustees are not able, or do not choose, to redeem it with specie, they redeem it by a *conditional* transfer of a corresponding portion of the capital. And the conditional holder of the capital thus transferred, holds

it, *and draws interest upon it*, until the trustees redeem *it*, by paying him its nominal value in specie.

*Under certain exceptional and extraordinary circumstances*, this conditional transfer of a portion of the capital, becomes an absolute transfer; and the conditional holder of the capital transferred, becomes an absolute holder of it — that is, an absolute stockholder in the bank.

*In such cases*, therefore, the *final* redemption of the currency consists in making the holders of the currency *bona fide* stockholders in the bank itself.

To repeat, in part, what has now been said:

The currency, besides being receivable for debts due the bank, is redeemable, *first*, with specie, if the bankers so choose; or, *secondly*, by a conditional transfer of a part of the capital.

The capital, thus conditionally transferred, may be itself redeemed, by the bank, on paying its nominal value in specie, with interest from the time of the transfer.

Or, this conditional transfer, of a portion of the capital, may, under certain circumstances, become an absolute transfer.

A holder of currency, therefore, is sure to get for it, either specie on demand; or specie, with interest, from the time of demand; or an amount of the capital stock of the bank, corresponding to the nominal value of his currency.

In judging of the value of the currency, therefore, he judges of the value of the capital; because, in certain contingencies, he is liable to get nothing but the capital for his currency. But if the capital be worth par of specie, or more than par of specie, he infers that his currency will be redeemed, either in specie on demand, or by a temporary transfer of capital; which capital will afterwards be itself redeemed with specie.

All that is necessary to make a bank, under this system, a sound one, is, that its capital shall consist of productive property — its actual value fully equal to, or a little exceeding, its nominal value — and of a kind not perishable, or likely to depreciate in value.



Mortgages, rail-roads, and public stocks will probably be the best capital; and most likely they are the only capital which it will ever be expedient to use.

If further explanation of the nature of the system be needed, at this point, it can be given — more easily, perhaps, than in any other way — by supposing the capital to consist of *land* — as follows:

Suppose that A is the owner of one hundred, B of two hundred, C of three hundred, and D of four hundred, acres of land; that all these lands are of uniform value, to wit, one hundred dollars per acre; that they will always retain this value; and that they are all under perpetual leases at an annual rent of six dollars per acre.

A, B, C, and D, put all these lands into the hands of trustees, to be held as banking capital; making an aggregate capital of one hundred thousand dollars. Their rights, as lessors, going with the lands into the hands of the trustees — that is, the trustees being authorized to receive the rents, *and apply them to the uses of the bank, if they should be needed.*

A, B, C, and D, then, are the bankers, doing business through the trustees.

Their dividends, as bankers, it is important to be noticed, will consist *both of the rents of the lands*, and the profits of the banking; making dividends of twelve per cent. per annum, if the banking profits should be six per cent.

The banking will be done in this way —

The trustees will make certificates for one, two, three, five, ten dollars, and so on, to the aggregate amount of one hundred thousand dollars; corresponding to the whole value of the lands.

These certificates will be issued for circulation as currency, by discounting notes, &c.

Each certificate will be, in law, a lien upon the lands for one dollar, or for the number of dollars expressed in the certificate.

The conditions of this lien will be these —

1. That these certificates shall be a legal tender in payment of all debts due the bank.

2. That when *one hundred dollars* of these certificates shall be presented for redemption, the trustees, unless they shall redeem them with specie, shall give the holder a *conditional* title to one acre of land. This conditional title will empower the holder to demand of the trustees rent for that acre, at the rate of six dollars per annum, until they redeem the acre itself, by paying him an hundred dollars in specie for it. And no dividends shall be made by the trustees, to the bankers, (A, B, C, and D,) *either from the rents of any of the other lands, or from the profits of banking*, until this conditional title to the one acre, given to the holder of currency, shall have been cancelled, by the payment of the hundred dollars in specie, with interest, or rent, for the time the conditional title shall have been in his hands.

3. That when certificates are presented for redemption, in sums *less* than one hundred dollars, the trustees, unless they redeem them with specie on demand, shall redeem them with specie, (adding interest, except on small sums,) *before making any dividends, either of rents, or banking profits*, to the bankers (A, B, C, and D).

4. Whenever an acre of land shall have been conditionally transferred in redemption of currency, a corresponding amount of currency (one hundred dollars) must be reserved from circulation, until that acre shall have been redeemed by the bank; to the end that there may never be in circulation a larger amount of currency, than there is of land, in the hands of the bankers, with which to redeem it.

5. So long as *any* of the lands shall remain the property of the original bankers, (A, B, C, and D,) — *free of any conditional title, as before mentioned* — the trustees will have the right, as their agents, to cancel all conditional titles, by paying an hundred dollars in specie for each acre, with interest, (or rent,) at the rate of six per cent. per annum, during the time the conditional title shall have been outstanding. *And the trustees must do this, before they make any dividends, either of rents, or banking profits, to the bankers themselves.*



But if, at any time, the banking shall be so badly managed, as that it shall become necessary for the trustees to give conditional titles *to the whole thousand acres*, (constituting the entire capital of the bank), the rights of the original bankers (A, B, C, and D) in the lands, shall then be absolutely forfeited into the hands of those holding the conditional titles; who will then become absolute owners of them (as banking capital, in the hands of the same trustees) — in the same manner as A, B, C, and D had been before; and will go on banking with them in the same way as A, B, C, and D had done, and through the agency of the same trustees.

This currency, it will be seen, must necessarily be forever solvent — supposing, as we have done, that the lands retain their original value. It will be absolutely incapable of insolvency; for there can never be a dollar of currency in circulation, without there being a dollar of land, in the hands of the bankers, (or their trustees,) which *must* be transferred (one acre of land for a hundred dollars of currency) in redemption of it, unless redemption be made in specie. All losses, therefore, fall upon the bankers, (in the loss of their lands,) and not upon the bill holders. If the bankers should fail — that is to say, if they should be compelled to transfer *all* their lands in redemption of their circulation — the result would simply be, that the lands would pass, *unincumbered*, into the hands of a new set of holders — to wit, the conditional holders — who would have received them in redemption of the currency — *and who would proceed to bank upon them*, (reissue the certificates, and redeem them, if necessary, by the transfer of the lands,) *in the same way that their predecessors had done.* And if they too, should lose *all* the lands, by the transfer of them in redemption of the currency, the lands would pass, *unincumbered*, into the hands of still another set of holders, (the second body of conditional holders, who will now become absolute holders,) who would bank upon them, as the others had done before them. And this process would go on indefinitely, as often as one set of bankers should

fail (lose *all* their lands). Whenever one set of bankers should have made such losses as to compel the *conditional* transfer of *all* their lands, the conditional transfers would become absolute transfers, and the lands would pass absolutely into the hands of a new set of holders (the conditional holders); and the bank, *as a corporation*, would be just as solvent as at first. So that, however badly the banking business should be conducted, and however frequently the *bankers* might fail, (if transferring all their capital (lands), in redemption of their circulation, may be called failing,) the bank itself, *as a corporation, could not fail.* That is to say, its circulation could never fail of redemption. The lands (the capital) would forever remain intact; forever equivolent to the circulation; and forever subject to a compulsory demand in redemption of the circulation. In this way all losses necessarily fall upon the bankers, (in the loss of their capital, the lands,) and not upon the bill holders, who are sure to get the capital (lands), dollar for dollar, for their currency, if they do not get specie.

From the preceding explanation it will be seen that, *if all lands were of an uniform value, and were to retain that value in perpetuity*, it would be perfectly easy to use them as banking capital, under the author's system, and thus create the most abundant and solvent currency that could be desired.

But all lands are not of a uniform value; and, therefore, they cannot be used, *acre by acre*, as banking capital, under this system. Nevertheless, by means of mortgages, lands may be used as banking capital; since mortgages upon lands can be made to any desirable extent, and all of a uniform value; or at least nearly enough so for all practical purposes. And this value they will retain in perpetuity.

The real estate of this country amounts to some ten thousand millions of dollars. Mortgaged for only half its real value, it would furnish banking capital to the amount of five thousand millions of dollars.

The rail-roads that we now have, and those that we shall have,



taken at only half their value, would furnish several hundred millions more of good banking capital.

There will probably also be two thousand millions, or more, of United States Stocks, which, *if they should stand permanently at par, or thereabouts*, will make good banking capital.

There is, therefore, no more occasion for a scarcity of currency, than for a scarcity of air.

And this currency would all be solvent, stable, and furnished at the lowest rate of interest at which the business of banking could be done.

Under such a system there could never be another *crisis;* the prices of property would be stable; the rate of interest would always be moderate; industry would be uninterrupted, and much more diversified than it ever hitherto has been; and prosperity would necessarily be universal.

No evils could result from the great amount of currency furnished by this system; for no more would remain in circulation than would be wanted for use. By returning it to the bank for redemption, the holder would either get specie for it, or have it redeemed by the conditional transfer to him of a part of the capital, *on which he would draw interest*, until the capital so transferred to him, should either be itself redeemed with specie, or made an absolute property in his hands. Currency, therefore, returned for redemption, and not redeemed with specie, *is really put on interest*, by being redeemed by the conditional transfer of interest-bearing capital. Whenever, therefore, if ever, the prices of property should become so high as not to yield as good an income as money at interest (the interest being paid in specie), the holders of currency would return it to the banks for redemption, beyond the ability of the banks to pay specie. The banks would be compelled to redeem it by the conditional transfer of interest-bearing capital; *and thus take it out of circulation.*

In short, the currency represents a dollar at interest, instead of a dollar in specie; and whenever it will not buy, in the market, property that is worth as much as money at interest,

(the interest payable in specie,) it will be returned to the bank, and put on interest, (by being redeemed in interest-bearing capital,) *and thus taken out of circulation.* No more currency, therefore, would remain in circulation, than would be wanted for use, *the prices of property being measured by the value of an interest-bearing dollar, instead of a specie dollar, if there should be a difference between the two.*

Such is, perhaps, as good a view of the *general principles* of the system, as can be given in the space that can be spared for that purpose. For a more full description, reference must be had to the pamphlet containing the system itself, with the Articles of Association, that will be needed by the banking companies. In the Articles of Association, the system is more fully developed, and the practical details more fully given, than they can be in any general description of the system.*

The recent experience of this country, under a currency redeemable only by being received for taxes, and made convertible at pleasure into interest-bearing bonds (U. S.), is sufficient to demonstrate practically — what is so nearly self-evident in theory as scarcely to need any practical demonstration — that under a system like the author's, where the currency (when not redeemed in specie on demand) is convertible at pleasure into solvent interest-bearing stocks, there could never be a redundant currency in actual circulation, nor any undue inflation in the prices of property. That experience proves that currency issued, and not needed for actual commerce, at legitimate prices, will be converted into the interest-bearing stocks which it represents, and thus taken out of circulation, rather than used to inflate prices beyond their legitimate standard.†

* In the Articles of Association, as published, the capital is supposed to be mortgages. If United States stocks should be used as capital, the Articles of Association would need to be the same as for mortgages, with but very trivial alterations. If rail-roads were to be used as capital, very considerable alterations would need to be made in the Articles of Association.

† The fact, that U. S. currency is now below par of specie, does not affect the principle stated in the text. That currency is worth, as all such currency must be worth, as much as the stocks into which it is convertible. The depreciation in the U. S. currency is to be accounted for, therefore, not at all on the grounds of superabundance for the uses of commerce, but on one or more of the following grounds, to wit: 1. That the public credit is suffering from the apprehension that the U. S. bonds may never be paid; 2, that the loanable capital of the country is either becoming exhausted, or finds more lucrative investments in business than in U. S. stocks; or, 3, that the burdens imposed upon the use of U. S. stocks as banking capital, are so great as to depreciate the value of the bonds.





This experience of the United States, with a currency convertible into interest-bearing bonds, ought, therefore, to extinguish forever all the hard money theories as to the indefinite inflation of prices by any possible amount of *solvent* paper currency. It ought also to extinguish forever all pretence that a paper currency should always be redeemable *in specie on demand;* a pretence that is merely a branch of the hard money theory. This experience ought to be taken as proving that other values than those existing in gold and silver coins — values, for example, existing in lands, rail-roads, and public stocks — can be represented by a paper currency, that shall be adequate to all the ordinary necessities of domestic commerce; and consequently that we can have, *at all times*, as much paper currency as our domestic industry and commerce can possibly call for; and that the frequent revulsions we have hitherto had — owing to our dependence upon a currency legally payable in specie on demand, and therefore liable to contraction whenever specie leaves the country — are wholly unnecessary. This experience ought, therefore, to serve as a practical condemnation of all restraints upon the most unlimited paper currency, provided only that such currency be solvent, and actually redeemable, at the pleasure of the holder, in the property which it purports to represent.

Substantially the same things are proved by the experience of England. The immense amount of surplus money in that country is not used to inflate prices at home; but seeks investment abroad. It is sent all over the world, either in loans to

governments, or as investments in private enterprises, rather than used to inflate prices at home beyond their true standard.

The experiences of the two countries, therefore, demonstrate that there is no such thing possible as an undue inflation of prices, by a *solvent* paper currency — that is, a currency always redeemable in the specific property it purports to represent. And such a currency is that which would be furnished by the author's system; for the property represented by it is always deliverable, dollar for dollar, in redemption of the currency itself.



## CHAPTER II.

### THE AUTHOR'S SYSTEM CANNOT BE PROHIBITED BY THE STATES.

THE author holds his system by a copyright on the Articles of Association, that will be needed by the banking companies. His system, therefore, stands on the same principle with patents and copyrights. And the use of it can no more be prohibited by the State governments, than can the use of a patented machine, or the publication of a copyrighted book.

The Constitution of the United States expressly gives to Congress "power to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And the laws passed by Congress, in pursuance of this power, are "the supreme law of the land, * * * any thing in the laws of any *State* to the contrary notwithstanding."

If the State governments could prohibit the use of an invention, or the publication of a book, which the United States patent or copyright laws have secured to an inventor or author, the whole "power of Congress to promote the progress of science and useful arts," by patent and copyright laws, could be defeated by the States.

Some persons may imagine that, whatever may be the right secured to inventors, by patents, the right secured to authors, by copyrights, is only a right to *publish* their ideas; leaving the State governments still free to prohibit the practical use of the ideas themselves. But this is a mistake. Of what avail would be the publication of ideas, if they could not be used? How utterly ridiculous and futile would be the idea of securing to the people a mere knowledge of "science and useful arts," with no

right, on their part, to apply them to the purposes of life. How *could* Congress "promote the progress of science and useful arts," if the people were forbidden to practise them? The right secured, therefore, is not a mere right of publication, but also a right of use.

The objects of patents and copyrights are identical, viz.: to secure to inventors and authors, *and through them to the people* — against all adverse legislation by the States — *the practical enjoyment and use of the ideas patented and copyrighted.*

Copyrights, it must be observed, are not granted, as some may suppose, for mere words — for the words of all books were the common property of mankind before the books were copyrighted; and they remain common property afterwards. The copyright, therefore, is for the ideas, and only for the ideas, which the words are used to convey, or describe.

In copyrights, therefore, equally as in patents, the right secured is the right to ideas; that is, to those ideas that are *original* with the authors of the books copyrighted. And the right thus secured to ideas, is the right, on the part of the author, not only to reduce those ideas to practical use himself, but also to sell them to others for practical use.

If the right, secured to authors by copyrights, were simply a right to *publish* their ideas, but not to use them, nor sell them to others to be used, the most important knowledge, conveyed by books, might remain practically forbidden treasures, if the State governments should choose to forbid their use.

These conclusions are natural and obvious enough; but as the point is one of great importance, it may be excusable to enforce it still further.

The ground here taken, then, is, that a State government has no more constitutional power to prohibit the *practical use* of any knowledge conveyed by a copyrighted book, than it has to prohibit the publication or sale of the book itself.

The sole object of the copyright laws are to encourage the production of *ideas* for the enjoyment and use of the people; to



secure to the people the right to enjoy and use those ideas; and to secure to authors compensation for their ideas. All these objects would be defeated, if the *States* could interfere to prevent the use of the ideas thus produced; because if the ideas could not be used, there would be no sale for the books; and consequently authors would get no pay for writing them; and would have no sufficient motive to write or print them.

It is an axiom in law, that where the means are secured, the end is secured; *that the means are secured solely for the sake of the end.* It would be as great an absurdity in law, as in business, to secure the means, and not the end; to plant the seed, and abandon the crop; to incur the expense, and neglect the profits. What an absurdity, for example, would it be for the law to secure a man in the *possession* of his farm, but not in his right to cultivate it, and enjoy the fruits. What an absurdity would it be for the law to secure men in the *possession* of steam engines, but not in the right to use them. But these would be no greater absurdities than it would be for the law to secure to the people a *knowledge* of "science and useful arts," but not the right to use them.

The sole object of the law in securing to all men the *possession* of their property of all kinds, is simply that they *may use it*, and have the benefit of it. And the sole object of the laws, that secure to the people *knowledge* — which is but a species of property, and a most valuable kind of property — is that they may use it, and promote their happiness and welfare by using it.

An illustration of the principle, that where the means are secured, the end is secured, is seen in the constitutional provision that "the right of the people to keep and bear arms shall not be infringed." This provision does not secure to the people a mere naked "right to keep and bear arms" — for that right would be of no practical value to them. But it secures the right also to *use* them in any and every way that is naturally and intrinsically just and lawful; for that is the only *end* the people can have in view in "keeping and bearing arms."

On the same principle, too, if the Constitution had declared that "the right of the people to buy and keep *food* should not be infringed," it would thus have guaranteed to them, not merely "the right to buy and keep food," but also the right to *eat* the food thus bought and kept; because the eating would be the only *end* that could be had in view in buying and keeping food.

Another illustration of the same principle is found in the constitutional provision that "Congress shall have power to coin money, and fix the standard of weights and measures." Have the States any power to forbid the people to buy and sell the money coined by the United States? Or to forbid the people to use the standard weights and measures fixed by the United States? Certainly not. Although the Constitution does not say it in express words, it does say, *by necessary implication*, that the money, coined by the United States, may be freely bought and sold by the people (because that is one of the ends for which the money is coined); and that the standard weights and measures, fixed by the United States, may be freely used by the people (for that is one of the ends for which the standard of weights and measures was fixed); and that the States can neither forbid the use of the weights and measures, nor the buying or selling of the coin.

The sole object of books is to convey knowledge. If the knowledge cannot be *used*, of what use are the books themselves?

If a *State* government can prohibit the use of the knowledge conveyed in a copyrighted book, it might just as well prohibit the *buying* or *reading* of the book. The object of the book would be no more defeated in one case than in the other.

This power of "promoting the progress of science and useful arts," by means of patent and copyright laws, was given to Congress principally, if not solely, because it was feared that the State governments might, in some cases, be unfavorable to that end. But if the States can *now* prohibit the *use* of the knowledge conveyed by books, they have that very power of obstructing



"the progress of science and useful arts," which the Constitution intended to take from them.

Furthermore, it is the *theory of the courts* that the nation *purchases* the ideas of authors and inventors; *that it purchases them solely for the use of the people;* and that it pays authors and inventors for their ideas, by giving them certain exclusive rights over them for a term of years.* By this theory, the ideas themselves are supposed to become the property of the nation, from the times when the patents or copyrights are granted; or from the times when the ideas are put upon the government records, in the patent office, or elsewhere. Now, suppose the United States government had been authorized, by the Constitution, to purchase the same ideas, *and pay the money for them*, instead of paying for them by giving the authors and inventors certain monoplies in the use of them. Could a State, in that case, have prohibited the practical use of the ideas, which the government had thus bought, and paid the nation's money for, solely for the use of the people? Clearly not. Suppose the United States government had been authorized (by the Constitution) to buy, and pay the money for, Morse's invention of the telegraph, for the use of the people. Could a State have pro-

* I do not say that the theory of the courts, as given in the text, is the true theory. I think it is not. I think the true theory is one much more favorable, not only to authors and inventors, but also to the public. But the theory given in the text is the one that prevails in the courts, not only of this country, but of England, and, so far as I know, of most or all other countries in which patents and copyrights are granted. And whether true or false, the theory is likely to prevail, I apprehend, for a long time to come. But I think the true theory is that authors and inventors have the same natural and Common Law right of property, and consequently the same perpetual right of property, in their ideas, the products of their mental labor, that other men have in material things, the products of their manual labor; and that governments have no more right to forbid the sale or use of one of these two kinds of property, than they have to prohibit the sale or use of the other. Under this latter theory, authors and inventors would be stimulated much more than they are now to the production of valuable ideas; and the public would be enlightened and enriched in a proportionally greater degree.

hibited the use of the invention, which the nation had thus bought for the use of the people, and paid the people's money for? Certainly not.

Suppose the United States government (being authorized by the Constitution), had bought books on agriculture, for the use of the people, and paid the nation's money for them — (instead of paying for them by copyrights, as it does now) — books on the chemical nature and treatment of soils, books on the various plants which the people wish to cultivate, and the various animals which the people wish to rear. Could a State have forbidden the people to read those books? Or to practically apply the knowledge conveyed by them? Clearly not. The idea would be preposterous. The principle that the United States Constitution, in securing to the people those means of agricultural progress, had, by necessary implication, secured to them the right to use those means against all interference by the States, would have been a complete answer to any such pretence on the part of the States.

We might as well say that a State has a right to forbid the people to use the post office, which the United States government has provided for their benefit, as to say that a State has a right to forbid the people to use any "science or useful art," which the United States government has bought for their benefit.

Any other principle than this would authorize the States to prohibit the practical use of all ideas patented and copyrighted by the United States; and thus utterly defeat the power given to Congress "to promote the progress of science and useful arts," by means of patents and copyright laws.

It is to be borne in mind that the people of a single State are not the only ones interested in the practical use of patented and copyrighted ideas within that State.

If, for example, the cotton growing States were to prohibit the use of Whitney's patented cotton gin within those States, the people of all the other States, that manufacture or wear cotton goods, would be made the poorer by the act. If Louisiana were



to prohibit the use of Fulton's patented steamboat within her limits, a great blow would be struck at the commerce and industry of the whole Mississippi valley. If Ohio, Indiana, Illinois, Iowa, and Wisconsin, were to prohibit the use of McCormick's patented reaper within those States, the price of grain would be affected throughout the whole country. If Massachusetts were to prohibit the use of patented sewing machines, the prices of boots, shoes, and all other clothing, manufactured within the State, for the people of other States, would be enhanced. If New York were to prohibit the use of Hoe's patented printing press within that State, all the commercial intelligence that radiates from the city of New York, would be delayed, and made more expensive; and the commerce of the whole country would be injured. For these reasons no State can be permitted to prohibit, within her limits, the use of any of the "sciences and useful arts," which may be patented or copyrighted by the United States.

The same reasons apply to currency. If New York, for example, were to prohibit all but a metallic currency within her limits, the commerce of the whole country, so far as it is carried on within the city or State of New York, would be disturbed, obstructed, and injured. The industry of the whole country would be discouraged to a corresponding degree; and the whole country would be made the poorer. On the other hand, if the best systems of credit and currency, that can be invented, are allowed free course in the city and State of New York, that city and State can do very much, by the use of such credit and currency, to facilitate the commerce, and consequently to develop the industry, of every State in the Union. Even, therefore, if it were admitted that the State of New York might deprive her own citizens of useful inventions in currency and credit, it cannot be permitted to her to dictate in regard to the currency and credit used in the commerce of the whole country within her limits. She is not an independent nation in regard to commerce; and consequently not in regard to credit or currency.

The principle of the United States Constitution, in regard to ideas patented and copyrighted, or in regard to "the progress of science and useful arts," is, that authors, inventors, and people, shall have the free right to experiment with, and practically test, all ideas for themselves, without asking permission of the several State legislatures. It presumes that they (authors, inventors, and people) are competent to determine, after experiment, what inventions are practically valuable to them, and what worthless.

How preposterous would be the principle — as a political or economical one — that *all* the ideas, which authors and inventors may originate, in "science and useful arts," must be submitted to, and approved by, the several State legislatures, (who are utterly incompetent to judge of either their truth or utility,) before the authors and inventors can be permitted to demonstrate their truth or utility to the people, or the people be permitted to adopt them. Such a principle would be manifestly absurd, ridiculous, destructive of men's natural rights, and destructive of all "progress in science and useful arts." It would be a tyranny that no people on earth could endure. On such a principle, not even an almanac could be published, or a new rat trap used, within any State, until the legislature of the State should have solemnly sat upon it, and given it the sanction of their profound wisdom, or profound ignorance. If any thing of this nature were to be tolerated in this country, it would plainly be most proper and expedient that Congress, as the legislature for the whole country, should take the matter in hand, and decide, for the whole country, upon the truth and utility of all new ideas offered for public adoption; instead of referring them to the several State legislatures. But Congress knows that they are utterly incompetent to any such task; and, therefore, they leave the whole matter — as the Constitution intended they should — to be determined by the authors, inventors, and people interested. And if this is the principle of the Constitution in regard to all other ideas in "science and useful arts," it is equally the principle of the Constitution in regard to currency (other than legal tender) and credit; for the Constitution makes no discrimination between inventions and ideas on these latter subjects, and those in relation to other matters (as we shall more fully see in subsequent chapters). The Constitution knows but one law for all new ideas in "science and useful arts." And that law is that authors and inventors may come freely face to face with the people, and test all ideas to their mutual satisfaction; leaving the people free to adopt or reject at their own discretion.



If there be any one of the "useful arts," to which the foregoing principles *ought* to be applied, banking is preëminently that one. (By banking is here meant the art of representing by paper — for loans and currency — other values than those existing in coin.) Banking is the art of arts. It is the art upon which nearly all other arts depend mainly for their efficiency; as experience has demonstrated continually for the last hundred years. Directly or indirectly it furnishes both the tools and materials for nearly every trade. Directly or indirectly it creates the demand for, and furnishes the supply of, every marketable commodity. For the want of such adequate credit and currency as banking is capable of supplying, all other arts, especially the mechanic arts, are at all times greatly crippled, and at frequent intervals paralyzed; the natural and normal demand for manufactured commodities suspended, and their prices struck down; the rich made poor, and the poor driven into idleness and destitution. The industry of almost any people — even of those among whom the mechanic arts have already made the greatest progress — would probably be doubled in value by such a diversity of production, such an increase of machinery, such uninterrupted activity, and such stability in prices, as an adequate system of banking would introduce. And the wealth thus produced would be far more equally and equitably distributed than wealth is now.

The imperfection or inadequacy of all former systems of banking is a thing on all hands confessed. There is no art, in which there is greater need of invention. Consequently there is none, in which invention is better entitled to all the protection which

the constitutional power of Congress "to promote the progress of science and useful arts" can give.

For the reasons that have now been given, the right to use practically the author's system of banking, is absolutely secured to him and his assigns, by the United States copyright; and, as has already been said, can no more be prohibited by the State governments, than can the use of a patented machine, or the publication of a copyrighted book.

By what has been said, it is not meant that the patent or copyright laws of Congress are designed, or can be used, to shield a person in the commission of any acts that are fraudulent, or intrinsically criminal; but only that they are a protection for the free use of all ideas, that are patented and copyrighted by the United States, *and that are, naturally and intrinsically, innocent and lawful.*

That the author's system of banking is, naturally and intrinsically, innocent and lawful — as clearly so as any other system of banking that was ever invented — no one will dispute. The honest use of the system, therefore, cannot be prohibited by the States. But any frauds or crimes, committed under color of using the system, may be punished like any other frauds or crimes.

The same principles, of course, apply to any and every other system of banking, which is, naturally and intrinsically, innocent and lawful, and which men may invent, and choose to experiment with, and put in practice. Men have the same natural and constitutional rights to invent, experiment with, and get patented or copyrighted, and put in practice, new systems of banking, as they have to invent, experiment with, get patented, and put in operation, new churns and washing machines. And the only restraints, that can constitutionally be imposed upon them, by the State governments, are, that the natural "obligation of their contracts" must be enforced, and they must commit no frauds nor crimes.*

* It will be seen in a subseqnent chapter (the 4th) that the Supreme Court of the United States has expressly declared "that the States have no power, by



taxation, or otherwise, to retard, impede, burden, or in any manner control" the nse of ideas *patented* by the United States. And the same principle obviously applied to ideas copyrighted; for ideas copyrighted are intrinsically of the same nature with those patented; and are placed by the Constitution upon the same ground. In the case of Wheaton *vs* Peters, the Supreme Court of the United States held in argument (though that was not the point to be decided) that a copyright was of the same nature as a patent. (8 *Peters' Rep., pp.* 657-8.)

The only difference between patents and copyrights is one of form, and not of substance; and has reference to the mode of securing compensation to the authors of the ideas patented and copyrighted, rather than to the right of the people to use those ideas. In both cases alike, the people have the right to nse the ideas, *with the consent of the authors.* And, on the theory, that now prevails with the conrts, (but which, as I have before said, I do not admit to be the trne theory,) the people have the right, *without the consent of the authors,* to nse patented and copyrighted ideas in any and every possible way, except in those particnlar modes that are reserved or granted, as an "exclnsive right" to the authors, to compensate them for the ideas themselves.

The obvious *constitutional* duty of Congress is to secure, for limited times, to both anthors and inventors, *all* "the exclusive rights" to their respective ideas, *that can be made practically valuable to them.* And snch was the obvions intention of Congress in enacting the existing copyright laws; (althongh snch may not, perhaps, be the legal effect of those laws in all possible cases.)

Thns the *patent* laws secure to the inventor of a machine, and to his assigns, "the exclusive right to make, use, and vend to others to be used," a machine of that kind, or one embodying *any* of the *original* ideas incorporated in it. But the ideas, embodied in the machine, may be written about, and printed, without the consent of the inventor, and used in any possible way, *except in making or using a machine;* which latter is supposed to be the only way in which the ideas can be made practically valnable to him. The copyright laws, on the other hand, secure to an author and his assigns the sole right of making and selling copies of his book, or any part of it that is original with himself. But other persons may nse the ideas, without his consent, in any manner they can, *without making or selling a copy of the book, or any part of it;* which latter are snpposed to be — and in most cases are — the only rights that can be made practically valuable to the author. In some cases, however, as in the case of dramatic compositions, the copyright laws secure to the authors and their assigns, not only the exclusive right of making copies of the pieces, but also the exclusive right of performing them in public.

As the copyright laws of Congress now stand, and are now interpreted by the courts, the ideas embodied in the author's banking system, conld be nsed, in defiance of his copyright, if it were *practically possible* for such a banking company to have a legal existence, and carry on the business of banking, *without having any Articles of Association similar, in whole or in part, to those he has copyrighted.*

But as neither of those things would be practically possible, and as he and his assigns have the exclusive right secured to them of making copies, either in whole, or in part, of the Articles of Association, his copyright gives him a legal control over the system.

The system is undoubtedly a legitimate subject of patent; for banking is as much an "art" as is the spinning or weaving of wool or cotton. But the copyright accomplishes all that a patent could; and is, in some respects, preferable.



## CHAPTER III.

### THE AUTHOR'S SYSTEM CANNOT BE TAXED, EITHER BY THE UNITED STATES, OR THE STATES.

NEITHER the United States, nor the States, can *tax* the author's system of banking, *consistently with the theory which the courts hold in regard to patents and copyrights.*

That theory is, that a patent or copyright, guaranteeing to an inventor or author, and his heirs and assigns, the free and exclusive right to use his invention, or publish his book, for a term of years, is the *price* which the United States government, as agent for the whole people, pays an inventor or author for his invention or book, for the benefit of the public.*

The courts hold that the reasons for granting patents and copyrights are these, namely, that an inventor has in his mind an invention, or an author has in his mind a book, which, it is supposed, may be of value to the public; but that neither the inventor nor the author has any sufficient inducement to make his

* I have before said that I do not believe that the theory of the courts is the true one. But it is the one *least favorable* to the rights of authors and inventors; and is likely to prevail, for the present at least, if not forever. I think the true theory is, that authors and inventors have the same natural and common law right of property in their ideas, the products of their labor, that other men have in material things, the products of their labor; and that government is as much bound to protect the former as the latter. If this theory were to prevail, authors and inventors could very well afford to have their property in ideas taxed; because their property would not only be protected by the criminal law, but it would be protected in perpetuity, like other property. But now the government virtually says to authors and inventors, "Sell your ideas to the government for such price as the government chooses to pay, or you shall have no protection at all for your rights in them." Saying this, and having its offer accepted, it clearly cannot, in good faith, tax the *price* which it has promised to pay.

invention or book known, unless he can derive some pecuniary advantage from it. The United States, therefore, says to the *inventor:* If you will secure your invention to the use of the public, by putting upon the government records such a description of it, and of the manner of using it, as that the public will be able, from your description, to make and use your machine, in defiance of you, (after your patent shall have expired,) the government will, as a compensation for your so doing, secure to you, and your heirs and assigns, the free and exclusive use of the invention for a given number of years. When, therefore, the inventor has put upon the government records such a description of his invention, and of the manner of using it, as the government stipulates for, the bargain is complete, and the faith of the government is pledged, that he shall have the free and exclusive use of his invention for the term of years agreed on.

The United States says also to the *author:* If you will secure to the public the right to your book, by depositing a copy with the government, so that it may be republished in defiance of you, (after your copyright term shall have expired,) the government will secure to you, and your heirs and assigns, the free and exclusive right to publish and sell it for a term of years. When, therefore, the author has deposited with the government a copy of his book, in pursuance of this stipulation on the part of the United States, the contract is complete, and the faith of the government is pledged, that he shall have the free and exclusive right to publish his book for the term of years agreed on.

The amount of these transactions — according to the theory of the courts — is, that the government *buys* an author's or inventor's ideas, and contracts to give him, as compensation for them, a certain exclusive use of them for a term of years.

The courts hold that the general government, on behalf of the whole country, makes this contract with authors and inventors; being specially authorized to do so by the Constitution of the United States.

On this theory, the government cannot consistently tax, either



the ideas themselves, or the use of them. It cannot consistently tax the ideas themselves, as property, for they are supposed to be the property of the United States; and for the government to tax them, as property, would be taxing its own property; and would be as absurd as it would be to tax the National Capitol, or any other property of the government. It cannot consistently tax the author or inventor for his exclusive use of the ideas; for that exclusive use is the *price* which the government agrees to pay him for his ideas; and is, therefore, a debt, which it owes him. It, therefore, can no more consistently tax him for receiving this pay for his ideas, than it can tax any body else for receiving his pay for services rendered, or property sold, or money lent, to the government.

This *price*, be it observed, which the United States government agrees to pay, is not paid in full, until the patent or copyright term has expired; because the price itself consists in the exclusive use, *or in the government protection to the exclusive use*, of the invention or book, *for that term*. If, now, the government can tax this price, before it is fully paid, *it really taxes a debt which it owes*. And for the government to tax a debt, which it owes, is really keeping back a part of the debt.

In other words, if, before the inventor or author shall have had the free and exclusive use of his invention or book secured to him for the full term stipulated for, the general government can *tax* this free and exclusive use, *which, for a valuable consideration paid to the United States, by the author or inventor, has been guaranteed to him*, it can wholly or partially invalidate the contract made with him. Such a tax is virtually withholding, or keeping back, or taking back, a part of the *price*, which the United States, on behalf of the whole country, had agreed to pay him. If the use of the invention or book can be taxed to the amount of one per cent., ten per cent., fifty per cent., or one hundred per cent., of its value, by the very government that promised to secure the use to him, then one per cent., ten per cent., fifty per cent., or one hundred per cent., of the *price*,

agreed to be paid to him, is taken back, or virtually withheld from him, by the very party that promised to pay it to him.

Such a tax, according to the theory of the courts, would be a tax upon a *debt*, which the United States owes the author or inventor. And a right, on the part of the United States, to impose such a tax, would be as absurd, and as inconsistent with the obligation of a debt, as would be the right of any other debtor, to tax his creditor for the debt due by the former to the latter. If all debtors could tax their creditors at pleasure for the debts due by the former to the latter, the payment of debts would be a very easy matter. And if the United States can tax, at pleasure, all the debts they owe, the public debt may *legally*, and consistently with the public faith, be very easily paid.

When the United States government voluntarily becomes a debtor, by purchasing something valuable, and agreeing to pay for it at a future time, it voluntarily puts itself in the position of any and all other debtors. That is, it agrees to pay the amount *in full;* and not merely to pay all except what it may choose to withhold, or take back, under the name of taxation. A promise of this latter kind would amount to no promise at all.

Suppose the United States government (as agent for the whole country) were to purchase, of an individual, supplies for the United States army; and were to give him a contract to pay him in six months. And suppose that, before paying this debt, the government should tax it, to the amount of one hundred per cent., in the hands of this creditor of the United States. How much would this creditor have coming to him when the contract should be due? Or how much would he realize for the supplies he had furnished, and taken the government's contract for? Nothing. Yet a tax of one per cent. would be just as absurd in principle, and just as inconsistent with the obligation of a debt, as would be a tax of one hundred per cent. Such taxation would clearly be withholding a part of the debt, which the government owed him, and had agreed to pay him, for value received. The government might just as well have seized the supplies, without pretending to



make any compensation at all, as to pretend to buy them, promise to pay for them, and then tax that debt or promise before it is fulfilled. It is for this reason, that the general government cannot, without a breach of faith, tax any portion of the debt it is now contracting. Such a tax would really be a mode of withholding payment of money it had agreed to pay. And for the same reason the general government cannot, consistently with the theory of the courts in regard to patents and copyrights, tax them, or the use of them. Such taxation, according to the theory of the courts, would be withholding a part of the *price*, which the general government, on behalf of the whole country, had agreed to pay for books and inventions.

And what the general government cannot, consistently with the public faith, do, in the way of taxing patents and copyrights, the States, counties, cities, and towns cannot consistently do; because any contract, made by the general government, is made for and on behalf of the whole country; and States, counties, cities, and towns are as much bound by it, as is the general government itself.

If States, counties, cities, and towns could tax patents and copyrights, they could wholly or partially, (according to the extent of the tax,) defeat the value of the contracts, which the United States, on behalf of the whole country, makes with authors and inventors.

The subscriber is not aware that inventions and copyrights, *or the use of inventions or copyrights*, have ever been taxed, either in this country, or in any other, until the recent tax upon telegraphic messages. And this tax, according to the theory of the courts, ought clearly to be held illegal, or at least inconsistent with the public faith.

The country has too great an interest in "the progress of science and useful arts," to tolerate Congress, or the State governments, in breaking faith with authors and inventors, by robbing them, either directly or indirectly, of the free and exclusive right to "their writings and discoveries" for the term of years

that was stipulated for, when, relying upon the public faith, they sold their ideas to the government, (as they virtually did when they put their books and inventions beyond their own control, by putting them upon the government records.)*

For the reasons now given, the subscriber assumes that the use of his system of banking will never be taxed, either by the United States, or the States.

This freedom from taxation is perfectly just, for still another reason, namely, that the land, which constitutes the banking capital under the author's system, is liable to be taxed, *as land*, at its true value, equally with all other land. The fact that it is used as banking capital, is no reason for taxing it beyond its true value, when all other land is equally free to be used as banking capital, if the owners shall so choose.

This exemption from taxation is likely to be an important matter for many years, if not forever; and is sufficient, of itself, to challenge the consideration of bankers.

* We shall see, in the next section, that the Supreme Court of the United States have expressly said that *patent rights* cannot be taxed *by the States*. And if the States cannot tax patent rights, they cannot tax copyrights, for both are of the same nature intrinsically, and both are put upon the same basis by the Constitution. The Supreme Conrt of the United States has also expressed the opinion that they are of the same nature. (*Wheaton et al*, vs. *Peters et al.* 8 *Peters' Reports*, 657–8.)



## CHAPTER IV.

### THE STATE GOVERNMENTS CANNOT CONTROL, OR IN ANY MANNER INTERFERE WITH, THE AUTHOR'S SYSTEM.

THE same reasons that have been already given against the right of the State governments to prohibit, or tax, the use of the author's system of banking, are equally weighty against all power, on the part of the States, to assume to control, or in any manner interfere with, the operation of the banks, either by restricting the rates of interest or exchange, or subjecting the banks to the oversight of Commissioners, or requiring them to keep on hand given amounts of specie, or to publish statements, or make returns, of their condition or proceedings.

A State, for example, would have no more power to fix the rates of interest or exchange, taken by these banks, than to fix the price paid for the use of a patented machine, or for the publication of a copyrighted book. Nor would it have any more power to subject the banks to the oversight of Commissioners appointed by the State, than it would to subject the use of all patented machines, and the publication of all copyrighted books, to the supervision of Commissioners appointed by the State. It would have no more right to require the banks to make returns, or publish statements, of their condition and proceedings, than it would to require the same things of all persons using patented machines, or publishing copyrighted books.

If the State governments can, *in any way*, obstruct or embarrass authors and inventors in the use of their copyrights and inventions, they can impair or destroy the value of the copyrights or patents granted by the United States; and so far defeat the Constitution of the United States, and the powers of Congress on this subject.

The Supreme Court of the United States has explicitly indorsed these principles, by declaring that the use of "*patent rights*" can neither be *taxed, retarded, impeded, burdened, nor in any manner controlled, by the State governments.* And the same principle obviously applies to *copyrights,* because these are intrinsically of the same nature with patent rights, and because also the rights of authors and inventors are placed upon the same grounds by the Constitution.

This declaration of the Supreme Court was made in the case of *McCulloch* vs. *Maryland,* 4 *Wheaton's Reports.* It was made incidently, but nevertheless explicitly, and as illustrating a principle which the court declared to be vital to the existence and operation of the general government.

The immediate question, before the court, was, whether the State of Maryland had a right to *tax* the Maryland branch of the United States Bank?

The court first determined that the United States had a constitutional right to create a bank to be employed *as an agent of the United States* in keeping and disbursing the public monies.

The court next declared "that the power to *tax* involves the power to destroy;" and that to allow the States to tax, or exercise any authority whatever over, any of the agencies employed by the United States in executing its constitutional powers, was incompatible with the supremacy of the United States, and was equivalent to subjecting the United States government to absolute destruction, whenever the State governments should please to destroy it.

And in this connexion, the court spoke of the United States mails, of the mint, *of patent rights,* of the papers of the Custom House, and of judicial process of the United States, as illustrations of the various means used by the United States, and which could not be taxed, nor in any manner interfered with, by the States.



Thus the court say,

"If we apply the principle for which the State of Maryland contends [that the States *may* tax the means employed by the general government for executing its powers] to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof to be supreme; but this principle would transfer the supremacy, in fact, to the States.

"If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; *they may tax patent rights;* they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. *This was not intended by the American people. They did not design to make their government dependent on the States.*" Page 432.

Also the court say,

"The court has bestowed on this subject its most deliberate consideration. *The result is a conviction that the States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.* This is, we think, the unavoidable consequence of that supremacy which the Constitution has established." Page 436.

This was an *unanimous* opinion of the court — expressly declared by them to be such. And, as we have already seen, they expressly applied the principle to "*patent rights.*" And if the principle is applicable to patent rights, it is equally applicable to copyrights; because they are both of the same nature, and stand on the same grounds in the Constitution.*

We have, then, in effect, an explicit declaration of the Supreme

* In the case of Wheaton et al, *vs.* Peters et al, the Supreme Court of the United States incidentally expressed the opinion that a copyright was of the same nature as a patent right. (8 *Peters' Reports, pp.* 657–8.)

Court of the United States, "*that the States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control,*" the use of patents and copyrights, granted by the United States.

If the bankers should commit any frauds, or any acts that were intrinsically criminal, they could be punished, as for any other frauds or crimes; because patents and copyrights do not authorize the commission of crimes. Or if they should not fulfil their contracts, they could be compelled to fulfil them. But so long as they should fulfil their contracts, and be charged with no acts intrinsically criminal, a State government could no more interfere with them as banks, than it could interfere with anybody else for using a patented machine, or publishing a copyrighted book. And thus the business of banking (including the rates of interest and exchange) would be entirely relieved from all that arbitrary and tyrannical State legislation, which has hitherto been so annoying, vexatious, and injurious both to bankers and to the public.

If there is any business whatever, that ought to be free from all arbitrary restraints and interference, it is banking; for the reason that, in this country, the credit and currency furnished by the banks, are the direct mainsprings of nearly all our industry and commerce. All arbitrary restrictions upon banking, are, therefore, nothing else than arbitrary restrictions upon industry and commerce; and are as absurd, injurious, and tyrannical as would be arbitrary restrictions upon the use of steam engines, water wheels, locomotives, or any other machinery or instrumentalities by which our industry and commerce are carried on.

If banking is an intrinsically criminal business, it should be prohibited altogether. If it is an innocent and useful one, it should be free from all arbitrary restrictions and interference, like any other honest business. Free competition, and freedom from all arbitrary interference, in banking, will furnish the best currency and credit, and at the cheapest rates, just as free competition, and freedom from all arbitrary interference, in all other business, furnish the best commodities, and at the lowest prices.



## CHAPTER V.

### UNCONSTITUTIONALITY OF THE LEGAL TENDER ACTS OF CONGRESS.

THE general government is attempting, by its legal tender acts, and its bank act, to force into circulation its own currency, and the currency of banks authorized by itself; and to force out of circulation all other currency; or to bring it down to a level with its own. This makes it necessary to consider the constitutionality of the legal tender acts of Congress.

Those, who imagine that the legal tender acts of Congress are constitutional, seem to imagine that Congress have power to fix, *and do fix*, the legal tender in payment of debts in all cases whatsoever; that they have power not only to prescribe *what* shall be the legal tender in payment of all debts, but also to say *how much of any thing whatever* (which they may choose to call a legal tender) shall be sufficient to satisfy any debt whatsoever; that, in short, Congress have power to declare arbitrarily what, and how much, all contracts, between man and man, shall amount to; and at their pleasure or discretion, to make them more, less, or other than the parties have made them.

Thus they hold, *in effect*, that men have no power, *of themselves*, to make obligatory contracts; and that men's contracts with each other have, of themselves, no validity at all, which the laws are bound to recognize and maintain; but that it rests with Congress, in their discretion, or at their will, to alter men's contracts, and make them valid for more, less, or other than the parties have agreed on.

All these enormous conclusions legitimately and necessarily

follow from the idea that the late legal tender acts of Congress are constitutional.

But, in truth, Congress have no powers whatever of this kind. Parties make their own contracts; and Congress have no power whatever to make them more, less, or other than the parties have made them. Congress have no power to say *how much of any thing* — gold and silver coin, or any thing else — shall be sufficient to satisfy any contract whatever between man and man.*

Parties make their own contracts. Of course they, and they alone, fix the tender. That is, they agree what, and how much, is to be paid. Otherwise there would, in law, be no contract. A contract to pay no particular thing, and no particular quantity of any thing, would, in law, be no contract at all. To make a contract, then, is necessarily to fix the tender. Parties cannot make valid binding contracts otherwise than by themselves fixing the legal tender, both in kind and amount.†

What the debtor agrees to pay, and the creditor to receive, is the legal tender, and the only legal tender, both in kind and amount, in payment of that debt. And Congress have no au-

* Unless it be that, under the "power to pass uniform laws on the subject of bankruptcy," they can say how much or little of a bankrupt's effects, shall be sufficient to entitle him to a discharge from his debts.

† The case where one man promises to pay another what the latter's labor, for example, *shall be worth*, leaving the precise amount to be ascertained afterward, is no exception to the principle stated in the text; for, in law, that is certain, which can be made certain. And in the case of all contracts, of the kind mentioned, it is presumed that the value of the labor can be ascertained, or made certain.

Neither is the case, where the particular kind of thing to be paid, is not specially mentioned by the parties, an exception to the principle stated in the text. In such a case the law presumes, *on the ground of probability*, that it was understood between the parties that coin was to be paid; because that is the thing most commonly agreed by the parties to contracts, to be paid. But that probability can be rebutted, in any particular case, if it can be shown, from any circumstances, such, for example, as previous dealings between the parties, that it was more probably understood between them, at the time of the contract, that payment should be made in something else than coin.



thority in the matter, to alter the legal tender, or make the contract more, less, or other than the parties themselves have made it. If it were not so, men would be deprived of all power of making their own contracts.

Thus, where a contract is to pay one hundred bushels of wheat, one hundred bushels of wheat constitute the legal tender, and the only legal tender, in fulfilment of that contract, or in payment of that debt; and Congress have no power to alter it. Congress have nothing to do with the matter.

So, too, if one man contracts to convey his farm to another, that farm is the legal tender, and the only legal tender, in fulfilment of that contract.

So, if one man contracts to give his horse to another, for value received, that horse is the legal tender, and the only legal tender, in fulfilment of that contract; and Congress have nothing to do with the matter.

On the same principle, when one man has contracted to pay another a hundred dollars, a hundred dollars constitute the legal tender, and the only legal tender, there can be in the case. *Not because Congress have made the dollars a legal tender: but because the parties themselves made the dollars the tender in that particular case;* just as, in the cases before supposed, the parties made the wheat, the farm, and the horse, the legal tender in those cases respectively.

If Congress can fix the tender, in payment of a debt, independently of the agreement of the parties, they can make at least *a part* of a contract between the parties, without their consent. But Congress have no more power to make any part of a contract between two parties, without their consent, than they have to make a whole one.

Congress have no power whatever in regard to legal tender, beyond what can be found in these words of the Constitution, to wit: "The Congress shall have power to coin money, and regulate the value thereof, and of foreign coin."

This is the only power given to Congress on the subject. And

here is no power given, *in express terms*, to make the coin mentioned, either domestic or foreign, "a legal tender in payment of debts." It is only by carefully analyzing all the terms of the provision, that, even by inference or implication, such an authority can be extracted from it. Let us see.

What is it "to coin money?" It is simply to weigh and assay pieces of gold, silver, or other metals, and stamp them in a manner to certify their quantity and quality — that is, their weight and fineness. This is the whole of it. And, *so far as this simple act of coining goes*, there is nothing that makes the coins a legal tender; or that gives Congress any authority to make them a legal tender.

After the pieces have been coined, they are sold by Congress in the market, and are afterwards sold by individuals in the market, for just what they may chance to bring, like any other merchandise; Congress having no control over their market value.

If a debtor agrees to pay, and a creditor to receive, these pieces of coin, the coins are thereby made the legal tender in payment of that particular debt. They thereby become necessarily the legal tender; *not because Congress have so prescribed, but because the parties have so agreed.* The parties, and not Congress, make them the legal tender.

Parties are under no legal obligation to make their contracts payable in coin — that is, in dollars. They are at perfect liberty to make them payable in wheat, corn, hay, iron, wool, cotton, pork, beef, or any thing else they choose. And when they do so make them, these other commodities become the tender; just as dollars become the tender when dollars are promised.

The whole object of coining money, therefore — *so far as a legal tender is concerned* — is, not to enforce any particular tender upon the parties to contracts, but that there may be in the community certain commodities, *suitable for a legal tender* — that is, whose quantities and qualities may be precisely known — *in order to facilitate the making and fulfilling of contracts by the parties, and the enforcing of them by the courts, with*



*perfect certainty and precision.* It is to furnish something, known to the law, and fixed by the law, and about which there may be no controversy between parties, and no doubt on the part of the courts, as to whether or not it is the identical thing — in kind, quantity, and quality — that was promised to be delivered.

When contracts are made to be fulfilled by the payment of wheat, wool, cotton, iron, &c., disputes are liable to arise between the parties as to whether the commodities tendered are of the precise quality with the ones promised. Hence litigation arises; and litigation too, which it is extremely difficult for courts to settle justly; because it is very difficult, and often impossible, for a court to know the precise quality of the commodities promised, as understood by the parties themselves at the times of their contracts.

It is desirable, therefore, that there should be something, known to the law, and which may be promised to be delivered, and about the quality of which there can be no dispute. Such a commodity serves both to prevent controversy and litigation, and to enable courts to settle them justly and truly when they do arise.

*So far, then, as a legal tender is concerned*, the whole object of the Constitution, in giving Congress "power to coin money," is, not at all to take away from parties their natural power and right to make such contracts as they please, or to impair their contracts when made, *but to aid them in making precisely such contracts as they wish;* and to insure the enforcement of the contracts, by the courts, precisely as the parties made them.

The object of the Constitution is to give the people *additional facilities* (beyond what nature has provided) for making their own contracts, and having them accurately enforced; and not at all to take from them any natural power or right to make such contracts as they please; or to give Congress any power to interfere with, control, invalidate, or impair the contracts made.

But, secondly, Congress have power not only "to coin money," but also "to regulate the value thereof, and of foreign coin."

What is it "to regulate the value thereof, and of foreign

coin?" Certainly it is not to fix the current value of the coins, *relatively to other commodities*. It is not, for example, to say how much wheat, wool, cotton, iron, hay, or any thing else, one dollar, or five dollars, in coin, shall buy.

For Congress to fix the value of the coins, relatively to other commodities, would be equivalent to their fixing the value of other commodities relatively to coin. But that, clearly, is a matter for parties to agree upon; and one with which Congress have nothing to do.

What, then, is this power of Congress "to regulate the value thereof, and of foreign coin?"

If the Constitution had said simply that Congress should have "power to coin money, and regulate the value thereof"— omitting the words "*and of foreign coin*"— the legal conclusion probably would have been, that Congress should only have power to coin money, and regulate the *intrinsic* value thereof— that is, fix, at their discretion, the quantity and quality of the metals of which the coins should be composed. But since Congress have "power to regulate *the value of foreign coin*"— the *intrinsic* value of which has already been fixed by the governments that coined them — we are, *perhaps*, under a necessity to *infer* that the power given to Congress "to coin money, and regulate the value thereof, and of foreign coin," is a power to fix the legal value of all these different coins *relatively with each other;* that is, a power to say how many coins of one kind or denomination, shall be equal in value to a given number of another kind, or denomination.

But, if we accept this inference, we are also under a necessity to infer that it is only in the single case of a "tender in payment of debts," that this legal value of the coins, as fixed by Congress, can be set up; for, in all other cases, it is clear that the parties to contracts are at perfect liberty to give and receive more or less for any one of the coins, than they would for any others of the same legal value.

It is, therefore, only by this *inference*, and this process of



reasoning, that we can come to the conclusion that Congress have any power at all to fix the value of their own coins, and of foreign coins, for the purposes of a "tender in payment of debts."

And when we thus find that Congress may, perhaps, have a certain power relatively to "a legal tender in payment of debts," we find that, at most, it is only a power to fix the value of the different coins, *relatively to each other;* and not relatively to other things. In other words, we find that it is a power simply to say, for example, that five dollars, in silver, shall be equal to one half eagle in gold; that an English pound sterling, shall be equal to four dollars eighty-five cents of United States coin; and that a French Napoleon shall be equal to three dollars eighty-five cents of United States coin. And that it is only in the single case of "a *tender* in payment of debts," that even this legal value of the coins, *relatively to each other*, can be fixed by Congress. In all other cases, all the different coins may be legally bought and sold at just such values as the parties to contracts may choose to put upon them.

The most, therefore, that can be said, in favor of the power of Congress, is, that they have power to coin money, and regulate the value of the different pieces thereof, and of foreign coin, *relatively to each other, for the single purpose of a tender in payment of debts;* and that they have no other power over the subject.

This power of Congress, it is to be noticed, is not a power to *make* the coins a legal tender, (when the parties to contracts have not done so;) but only a power to fix the value of the different coins, *relatively to each other, when the parties to contracts shall have made them a tender.* In other words, it is only a power to say that, when the parties to contracts shall have agreed upon the amount of coin, or the number of dollars, to be paid, they shall be understood to have contracted for so much coin, or so many dollars, of any, or all, these different kinds, (at the option of the debtor,) and not for any one kind of coin,

or one kind of dollars, rather than another of the same legal value.*

This power of Congress leaves parties at full liberty to make their own contracts; and consequently to fix their own tender, (without fixing which there can be no contract.) It only enables Congress virtually to prescribe beforehand what particular *words or terms* — such as dollar, eagle, dime, cent, and so forth — when used by the parties to contracts, shall be understood to mean. Just as Congress, in fixing the standard of weights and measures, virtually prescribe beforehand what the terms bushel, yard, rod, foot, acre, pound, gallon, &c., when used by the parties to contracts, shall be understood to mean.

This power of Congress to prescribe what certain terms, such as dollar, bushel, and the like, when used in contracts shall be understood to mean, is a power that can be exercised only within

* It was no doubt the intention that the legal value of the coins, relatively to each other, should correspond precisely with their mercantile value, relatively to each other. But as such might not always happen to be the fact, *it would seem* that if a contract were made for the delivery of coins of a specific kind, those coins only could be a legal tender in fulfilment of that contract; and that the legal value of the coins could be set up only in cases where the specific coins to be delivered had not been designated by the contract.

By this it is not meant that the particular name or denomination of the coin, as used in the contract, is always *necessarily* to determine the denomination in which the tender is to be made. As, for example, if a contract were simply for the delivery of "a hundred dollars," it is not meant that a hundred *separate* coins, of one dollar each, must be paid; and that ten eagles would not be a legal tender; because ten eagles *are* "a hundred dollars." That is, they include a hundred dollars; just as twenty-five bushels include a hundred pecks. An eagle *is* ten dollars; that is, ten dollars consolidated, or united. The law considers a "dollar," or "*unit*," (as the act of Congress expresses it,) *to be, not necessarily a separate coin, but a given quantum of gold or silver.* And an eagle contains, or consists of, ten of these "dollars," or "units." Therefore, if a contract were made simply for "a hundred dollars," ten eagles would be a tender of the precise number of "dollars," or "units," contracted for.

But if a contract were made for "a hundred *silver* dollars," then ten gold eagles would *probably not* be a legal tender in fulfilment of that contract; because the mercantile value of the former might exceed that of the latter; or the promisee might have some special use for the particular coins he had contracted for.



very narrow limits, to wit, the limits of prescribing that those terms shall be understood to mean either such coins and measures as Congress shall have previously established and designated by the same terms, or such coins and measures as Congress shall have previously designated as the equivalents of the coins and measures designated by those terms.

The object of giving to Congress these powers "to coin money, and regulate the value thereof, and of foreign coin, *and fix the standard of weights and measures*," is not at all to give Congress any power to control parties in making their contracts; nor any power to alter or impair their contracts when made; but only to provide certain coins, weights, and measures, that shall be known alike to courts and people, in all the States, according to which contracts *may* be made, *if the parties shall so choose;* and according to which contracts may be fulfilled, *when the parties shall have so agreed.*

Congress have plainly no more right to alter the tender, when the parties have agreed on one, than they have to alter a measure, when the parties have agreed on one. Congress have no more power, for example, to say, when a man has promised to pay a hundred dollars, that he shall be required to pay but fifty, or that he may tender something else than dollars, (or other coin of equal legal value,) than they have to say that, when he has promised to deliver a hundred bushels of wheat, he shall be required to pay but fifty; or that he may tender oats, apples, or onions, instead of wheat.

In short, Congress have no power whatever over men's contracts, except simply to say that when men shall have agreed to pay a certain number of coins, of a denomination or denominations which Congress shall have previously designated as being of the same legal value with certain other coins, this legal value of all the coins, *relatively to each other*, shall be recognized by the parties and the courts, and the contracts shall be fulfilled and enforced accordingly; and that when parties shall have agreed to pay a certain number of bushels, yards, or pounds, of any thing,

it shall be understood that the bushels, yards, and pounds agreed upon, are such bushels, yards, and pounds as Congress shall have previously designated.

This power of Congress to designate beforehand certain coins, weights, and measures, with reference to which contracts may be made, (if the parties so choose,) with the certainty of having them accurately and truly fulfilled, is totally different from a power to control, alter, or impair men's contracts, by prescribing that more, less, or other than the parties have agreed on, shall be a legal tender in fulfillment of their contracts. The former power is a power *in aid* of men's natural power and right to make their own contracts, and have them truly and accurately enforced. The latter power would be a power wholly destructive of all men's natural rights to make their own contracts, or to have them enforced.

This attempt, on the part of Congress, to alter the tender, from what the parties to contracts have agreed on, and to require parties and courts to recognise any thing but "coin" as "a legal tender" in fulfilment of contracts for the payment of coin, is one of the most naked, impudent, and wicked usurpations that can be conceived. There is not a syllable in the Constitution that gives the slightest color of authority for any such enactment.

When a man has contracted, for value received, to deliver a plough, have Congress any constitutional power to enact that he may tender a gun, in fulfilment of that contract? Or if he has contracted to deliver a horse, have Congress power to enact that he may tender a bull? If a man has contracted to convey his farm, for value received, have Congress any power to enact that he may tender cats, dogs, snakes, and toads, in fulfilment of that contract? If a milliner has contracted to deliver a bonnet, have Congress power to enact that she may tender a wheelbarrow, or a handcart? If a jeweller has contracted to deliver a necklace, have Congress any power to enact that he may tender a coal hod? If a man has contracted, for value received, to deliver, to a lady, chairs, sofas, carpets, mirrors, and pictures, for her parlor, have



Congress power to enact that he may tender tar, turpentine, oil, and lampblack, instead of the things agreed on? If a handsome and spirited young man has promised marriage with a young and beautiful woman, have Congress power to enact that he may tender a decrepid old man in his stead? Just as much constitutional power have Congress to do any and all these absurd and ridiculous things, as they have to alter men's contracts, or make any thing but "coin" a tender, where coin has been promised.

If Congress, under "the power to coin money, and regulate the value thereof, *and of foreign coin*," have power to say that United States *notes* shall be a legal tender in payment of debts, they have evidently the same power to say that *foreign notes* — or the notes of foreign nations — shall also be a legal tender. If the word "*coin*," as used in the Constitution, includes government notes, then certainly the words "*foreign coin*" include foreign government notes. So that, on the theory that Congress have power to make the United States *notes* a legal tender, it necessarily follows that they have equal power to make the notes of all other governments a legal tender.

Furthermore, the explicit provision of the Constitution, that "No *State* shall make any thing but *gold and silver coin* a tender in payment of debts," is additional and conclusive evidence, if any more could be needed, that *Congress* have no power to make any thing but *coin itself* a tender.

But it is said that Congress have power to debase the coin, and thus impair the value of existing contracts; and that, if Congress can impair existing contracts by debasing the coin, they have equal power to impair them by making something else than coin a tender.

It is true that Congress have power to debase the coin; but it is utterly untrue that they have any power to affect the value of existing contracts by so doing. It might as well be said that they have power to reduce the bushel, gallon, and yard measures; and by so doing reduce the value of existing contracts for the delivery of grain, spirits, and cloths.

It is an established principle in law, that the words of a contract are to be taken in the sense in which they are used at the time the contract is entered into; and that nothing subsequent can alter that meaning. Contracts for so many pieces of coin, are contracts for the things signified by those words at the time; and not for other and different things, that may be created afterwards, and made to bear the same names. In other words, contracts are for things, and not for mere names.

But the technical lawyer will, perhaps, inquire how can the original contract be enforced, or judgment be given for the coin contracted for, after the current coin of the country has been debased? The answer is, that in case of non-performance of contract, the principal has his option of two remedies, viz.: first, to bring suit for specific performance — that is, to compel the delivery of the identical thing promised, where its delivery is reasonably possible; and, second, where he does not desire the delivery of the identical thing promised, or where such delivery has become impossible, he can sue for the damage; the damage to be estimated and paid in the coin current at the time of the judgment.

Suppose, therefore, that from this day, the standard coin were to be debased to one half the value of the present standard; a creditor under a preexisting contract would have a right to demand payment of the original coin contracted for; and if payment were refused, he would have a right to sue for specific performance — that is, for the delivery of the particular coin contracted for. And it would be the duty of the court to enforce such delivery, if coin of the original standard were still in circulation so that its delivery was reasonably possible. But if the original coin had so far disappeared as to make its delivery practically impossible, then the creditor could sue for the damage; and it would be the duty of the jury, in estimating the damage, to take into account the relative value of the coin contracted for, and the debased coin, in which the damage was to be paid; and



to give judgment for such an amount of the latter as would be equal in intrinsic value to the former.

There would be as much reason in saying that Congress have power, by *increasing* the value of the standard coin, to increase the value of existing contracts for coin, as there is in saying that they have power, by debasing the coin, to diminish the value of existing contracts for coin.

In short, contracts for the delivery of coin, at a future time, are not simply contracts for such coins as may, at that future time, happen to bear the names mentioned in the contracts. But they are contracts for such amounts of real gold and silver as the terms employed signify at the times when the contracts are entered into.

We will now consider the argument closed, so far as it relates to the power of Congress to make government notes a legal tender, under their "power to coin money, and regulate the value thereof, and of foreign coin."

But, inasmuch as some of the courts, that have acted upon the question, have pretended that the power to make the notes a legal tender is *included* in some of the other powers of Congress, such as the powers "to borrow money," "to lay and collect taxes," "to regulate commerce with foreign nations, and among the several States," and to carry on war, it may be proper to devote a few words to these points.

To determine whether the power to make the notes a tender is *included* in any, or all, the powers just mentioned, we must keep in mind that, when it is said that one power of Congress is *included* in another, it is meant that the former is a part of the latter; that the former is included in the latter, just as a part of any thing is included in the whole; for example, just as a peck of grain is included in the bushel of grain, of which it is a part; and just as an ounce of silver is included in the pound of silver,

of which it is a part; and just as a rod of land is included in the acre of land, of which it is a part.

We must also keep constantly in mind — what has been already shown, in the former part of this chapter — that the whole idea of a tender arises out of the contract of the parties themselves; that what the debtor agrees to pay, and what the creditor agrees to receive, is the tender; and that, from the very nature of contracts themselves, (which are only the consent or agreements of the parties,) nothing else is the tender, or can be made so.

Congress have no more power to fix the tender, in any case, without the consent of the parties, than they have to make any or all other parts of a contract, without the consent of the parties. Unless, therefore, Congress have power to make contracts *ad libitum*, on behalf of individuals, and without their consent, they clearly have no power to make that part of their contracts, which fixes the tender, or the commodity in which their debts are to be paid.

The question, then, to be determined is *equivalent to this*, namely, whether the powers of Congress "to borrow money," "to lay and collect taxes," "to regulate commerce with foreign nations, and among the several States," and to carry on war, *include, as a part of themselves, a general and unlimited power of attorney, or a general and unlimited authority, to make any and all contracts, binding upon individuals, and binding their property, when the individuals themselves have made no contracts at all, and given no consent to those made in their name by Congress?*

Unless Congress have such a general and unlimited power of attorney, or such a general and unlimited authority, to make entire contracts, in the names and behalf of, and binding upon, individuals, without their consent, then they (Congress) have no manner of authority to make any contract whatever, *or any part of any contract whatever*, that shall be binding upon an individual, or that shall bind his property, when his own consent has not been given. And if they have no power to make any part of a contract for him, they have no power to contract that he will accept this, that, or the other thing, in payment of debts due him, when he himself has made no such agreement; but has agreed only to receive such coin, grain, or other thing, as was specially mentioned in the contract.



Plainly the powers of Congress "to borrow money," "to lay and collect taxes," "to regulate commerce with foreign nations, and among the several States," and to carry on war, *include* no power at all to make or alter any contracts whatever for private individuals. They no more include a power to make or alter any part of a contract, for a private person, without his consent, than to make a whole contract for him, without his consent. They no more include a power to make any thing a tender in payment of debts due him, which he has not agreed to receive, than they include a power to make contracts, between individuals, to buy and sell, borrow and lend, give and receive, all kinds of property, when the individuals themselves have never agreed to any thing of the kind.

There would be just as much reason in saying that, in granting to Congress the powers "to borrow money," "to lay and collect taxes," "to regulate commerce with foreign nations, and among the several States," and to carry on war, the Constitution had given Congress an unlimited power of attorney to make any and all possible contracts whatsoever, on the part of private persons, for buying and selling, for borrowing and lending, for giving and receiving, their property of all kinds, as there is for saying that the Constitution has appointed Congress the attorney of private persons, for agreeing what they will receive in payment of their debts.

But let us consider these several powers separately —

1. The power of Congress "to borrow money on the credit of the United States."

The government notes, which Congress have declared to be a legal tender in payment of private debts, are issued under this power "to borrow money." And, therefore, this is the power

that *ought* — if any of the powers of Congress ought — to include the power to make the notes a legal tender. But does it?

Certainly not; and for this reason, viz.: That there is no natural or logical connexion whatever between the power of Congress to borrow money of one man, and give him their note for it, and a power to make that note a legal tender in payment of a debt due to another man, who was not a party to the loan. As there is no natural or logical connexion between two such powers as these, it follows that one cannot be *included* in the other.

This power of Congress "to borrow money," is plainly a simple power to borrow it by private and voluntary contracts with those who choose to lend money to the United States. It has no reference to other persons, not parties to the loans, nor to the debts of individuals to each other. The act of borrowing is complete when Congress have obtained the money, and given their notes for it. There is an end of the whole transaction, so far as the "borrowing" of the money is concerned. And there is consequently the end of the power of Congress on that subject. It is preposterous to say that this power *includes, as a part of itself*, a power to make contracts, on behalf of other persons, not parties to the loan, as to what they will, or will not, receive, from *their debtors*, in payment of their debts.

When A lends money to B, and B gives his note for it, that contract *includes* no contract — and implies no power on the part of B to contract — that C, D, E, and every body else will receive his (B's) note in payment of any debts that may be due them. A and B, in this case, have no power whatever to make any contracts whatever affecting other men's rights.

So when Congress borrow money of A, and give him their notes for it, the contract is, in all respects, like that between two individuals. It includes no contract — and implies no power on the part of Congress to contract — that B, C, D, or any body else will accept the notes which Congress give to A for the money, as a legal tender in payment of debts due them.

The act of "borrowing money on the credit of the United States," is, in its nature, a wholly private and voluntary contract between Congress and the lender of the money. It is as much a private and voluntary transaction, as is the borrowing and lending of money between two individuals. No other persons, than Congress and the lender of the money, are parties to the loan. No other parties are consulted, nor allowed any voice, in regard to the matter. How, then, can it be said that the power of Congress to borrow money of A, by private and voluntary contract with him, *includes* a power to agree, on behalf of B, C, D, and every body else, who had nothing to do with the loan, that they will accept from their debtors, in satisfaction of the debts due them, something different from what they had agreed to receive, and their debtors had agreed to pay?



Plainly there is no manner of relation or connexion between two powers so utterly dissimilar and foreign to each other. Consequently one is not included in, and does not constitute a part of, the other.

The only other powers that could possibly be said to be naturally, logically, or impliedly *included* in this power of Congress "to borrow money," would be the powers to raise money by taxes or otherwise, and repay what they had borrowed. But these powers, instead of being left to implication, as being *included* in the power "to borrow money," are expressly conferred by the Constitution, in these other words, viz.: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, *to pay the debts*, and provide for the common defence and general welfare, of the United States."

Thus the Constitution has given to Congress, *in express terms*, all the powers that naturally belong together, or depend upon, or make parts of, each other, to wit: the powers to borrow money, and to raise money by taxes, &c., and pay what they have borrowed.

How absurd, then, is it, when the Constitution has been so explicit in granting all the powers on this subject, that are naturally related to each other, or in any way depend upon each other, to

say that the power to borrow money *includes* still another power, and one, too, entirely foreign to the subject, viz.: a power to make the notes, given for borrowed money, a legal tender in payment of debts to persons who had nothing to do with the loan.

2. The power of Congress "to lay and collect taxes, duties, imposts, and excises."

It is said that this power includes a power to say in what coin, currency, or other things, the taxes, duties, &c., shall be paid. Very well; suppose it does. How does this power to designate the commodity in which taxes shall be paid to the government, include any power to make contracts, on behalf of private persons, as to what commodities they will, or will not, accept in payment of debts due them?

For the sake of the argument, it may be granted that Congress have power to enact that all taxes, &c., to the United States shall be paid in *pigs*. But does that power *include* a general power of attorney, from every body in the United States, to agree that they will accept pigs in payment of all debts due them?

If a man owes the United States one, two, three, five, or ten pigs, as taxes, it may be practically necessary that he should either raise the pigs, or buy them. If he should not, Congress may have power to order the sale of so much of his property as will purchase pigs to the amount of his taxes. But all this implies no power whatever, on the part of Congress, to usurp his rights of making his own contracts, and to agree, on his behalf, and without his consent, that he will accept pigs in payment of any, or all, debts due him.

3. The power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

What is commerce? It is the purely voluntary act of two or more persons. It is the buying and selling, the borrowing and lending, the giving and receiving, of commodities by voluntary agreement between the buyer and seller, the borrower and lender, the giver and receiver.

What is it "to regulate commerce?" It is to secure and protect all voluntary commerce between individuals, that is *naturally and intrinsically just and lawful;* and to prohibit all commerce that is *naturally and intrinsically unjust and unlawful.*



This power of *Congress*, therefore, "to regulate commerce," is simply a power to secure and protect all commerce "with foreign nations, and among the several States, and with the Indian tribes," that is naturally and intrinsically just and lawful; and to prohibit all commerce that is naturally and intrinsically unjust and unlawful. And this is the whole of the power; unless possibly the power may include a power to render such *incidental aid* to the commerce of private persons, as it may be reasonable for Congress to render, and such as may be beneficial to the parties carrying on the commerce.

But the power of Congress "to regulate commerce," includes no power, on their part, to usurp the commerce of private persons. It includes no power to usurp the power of making contracts on behalf of private persons, without their consent. It includes, for example, no power to alter the contracts of private persons, and convert contracts for the delivery of grain, wool, or cotton, into contracts for the delivery of ice, iron, or coal. Of course, it includes no power to alter contracts for the delivery of coin, into contracts for the delivery of government notes.

It has been said by the Supreme Court of the United States, that the power of Congress "to regulate commerce," is a power "to prescribe the rule by which commerce is to be governed." *

Using the terms "prescribe," "rule," and "governed," in the senses in which the court evidently intended to use them — that is, to signify the exercise of arbitrary authority over commerce — this definition is an utterly false and atrocious one. It would give Congress power arbitrarily to control, obstruct, impede, derange, prohibit, and destroy commerce.

* *Gibbons* vs. *Ogden*, 9 *Wheaton*, 196.

It would also give Congress power to force men to carry on commerce against their will.

To force men to carry on commerce against their will, would be no more unjust or tyrannical than it is to prohibit, impede, or obstruct commerce, when men wish to carry it on.

It is a natural right of all men (who are mentally competent to make reasonable contracts) to make such contracts as they please, for buying and selling, borrowing and lending, giving and receiving, property, provided only that there be no fraud or force used, and that the contracts have in them nothing intrinsically criminal or unjust.

The free right of buying and selling, borrowing and lending, giving and receiving (by contracts naturally and intrinsically just and lawful) all property that is naturally a subject of bargain and sale, is among the most vital and valuable of all a man's natural rights. And this right Congress have no power to interfere with, under pretence of "regulating commerce."

Even the power of restraining commerce, otherwise just and lawful, in order to guard against contagious diseases and public enemies, is no exception to the principle laid down; for that commerce is not intrinsically just and lawful, which carries with it contagious diseases, or introduces, or opens the door to, public enemies.

The verb "to regulate," does not, as the court assert, imply the exercise of any arbitrary control over the thing regulated, nor any power "to prescribe [arbitrarily] the rule by which" the thing regulated "is to be governed." On the contrary, it comes from *regula*, a rule; and implies *the pre-existence of a rule, to which the thing regulated is made to conform.*

To regulate one's diet, for example, is not, on the one hand, to starve one's self to emaciation, nor, on the other, to cram one's self with all manner of indigestible and hurtful substances, in disregard of the natural laws of health. But it supposes the pre-existence of *natural laws of health*, to which the diet is made to conform.



A clock is not "regulated," when it is made to go, to stop, to go forwards, to go backwards, to go fast, and to go slow, at the mere will or caprice of the person who may have it in hand. It is "regulated" only when it is made to conform to, or mark truly, the diurnal revolutions of the earth. These revolutions of the earth constitute the pre-existing rule, by which alone a clock can be regulated.

A mariner's compass is not "regulated," when the needle is made to move this way and that, at the will of an operator, without reference to the north pole. But it is regulated when it is freed from all disturbing influences, and suffered to point constantly to the north, as it is its nature to do.

A locomotive is not "regulated," when it is made to go, to stop, to go forwards, to go backwards, to go fast, and to go slow, at the mere will and caprice of the engineer, and without regard to economy, utility, or safety. But it is regulated, when its motions are made to conform to a pre-existing rule, that is made up of economy, utility, and safety combined. What this rule is, in the case of a locomotive, may not be known with such scientific precision, as is the rule in the case of a clock, or a mariner's compass; but it may be approximated with sufficient accuracy for practical purposes.

The pre-existing rule, by which alone commerce can be "regulated," is a matter of science; and is already known, so far as the natural principles of justice, in relation to contracts, is known. The natural right of all men to make all contracts whatsoever, that are naturally and intrinsically just and lawful, furnishes the pre-existing rule, by which *alone* commerce can be regulated. And it is the only rule, to which Congress have any constitutional power to make commerce conform.

When all commerce, that is intrinsically just and lawful, is secured and protected, and all commerce that is intrinsically unjust and unlawful, is prohibited, then commerce is regulated; and not before.

Of course this power of Congress "to regulate commerce,"

*includes* no power to pervert, alter, impair, or destroy the natural or intrinsic obligation of men's contracts. Consequently it includes no power to convert a contract for the payment of gold and silver, into a contract for the delivery of government notes, or any thing else, to which the parties have never agreed.

If the power of Congress to regulate commerce were such an absolute power, as the Supreme Court represents it to be, viz.: a power "to prescribe the rule by which commerce is to be governed," this absurd result would follow, viz.: that all the legislation of Congress on the subject would be *necessarily constitutional;* and the Supreme Court itself would have no right even to consider the question of its constitutionality. It would have no function to perform in regard to such legislation, except simply to interpret and execute it. In ascribing such absolute power to Congress, therefore, the Supreme Court is really denying and abjuring its own constitutional power to judge of the constitutionality of the laws of Congress. Who, before, ever imagined that the constitutionality of the laws of Congress, in regard to commerce, was not a proper subject for judicial consideration, and adjudication?

But even if the power of Congress "to regulate commerce" were of that arbitrary and tyrannical character, which the court declares it to be, it would still be insufficient to accomplish the object of making the government notes a legal tender in payment of debts *generally;* inasmuch as the power is only a power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is not a power to regulate the purely internal commerce of a State — that is, commerce between two persons living within the same State. It could, therefore, do nothing towards making the government notes a tender between two such persons. Its practical effect, therefore, would be, in a great measure, defeated by this limitation upon the power itself.

4. The power to carry on war.

The Constitution grants this general power to Congress in the form of the several separate powers given below, (with the limitations upon them,) to wit:



"The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water: To raise and support armies; but no appropriations of money to that use shall be for a longer term than two years: To provide and maintain a navy: To make rules for the government and regulation of the land and naval forces: To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions: To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress."

In the name of common sense, how can it be said that any or all these powers *include* a power to meddle with, make, alter, or abolish the contracts of private individuals with each other? Or — what is equivalent thereto — to make any thing a legal tender in payment of private debts, which the parties themselves have never agreed to? The former powers are all naturally so entirely foreign to the latter, that, at first view, it would scarcely seem more ridiculous to say that the power of Congress "to define and punish piracies and felonies on the high seas, and offences against the law of nations," *included* a power to make government notes a legal tender in payment of private debts, than it does to say that the power of Congress to carry on war includes the power to make those notes a tender.

There would obviously be just as much reason, just as much congruity of ideas, and just as much natural and logical consistency, in saying that, because Congress have power to carry on war, and, in doing so, have occasion to sell old army stores, old horses, old muskets, old ships, and old war material in general, therefore the power of Congress to carry on war, *includes* a power to enact that whenever any old war material shall be sold, it shall become a legal tender, in the hands of the purchasers and

their assigns, in payment of all private debts, as there is in saying that, because Congress have power to carry on war, therefore, that power must include a power to make the notes given by them for money to carry on the war, a legal tender in payment of private debts.

There is just as much natural connexion between the power of Congress to carry on war, and a power, on their part, to make old war material, thus sold by them, a legal tender in payment of private debts, as there is between their power to carry on war, and a power to make the notes, given by them for money borrowed for the war, a legal tender in payment of private debts.

But it is said that Congress can borrow money cheaper, if they make their notes a legal tender, in the hands of the holders, than if they do not. So, also, it may just as well be said, that they can sell their old horses, old knapsacks, old muskets, old cannon, and old ships at higher prices, if they make them legal tender, in the hands of the purchasers and their assigns, than if they do not. If, then, the argument of profit is a sound one, in favor of the power, in one case, it is equally sound in the other.

But there is still another absurdity in this matter. The Constitution does not give absolute and unqualified power to Congress for carrying on war. It does not even give all the powers, which — but for the special limitations mentioned — would have been *naturally and logically included* in the general power to carry on war. For example, it says "No appropriation of money to that use shall be for a longer term than two years." It also "reserves to the States respectively the appointment of the officers [of the militia] and the authority of training the militia, according to the discipline prescribed by Congress."

When the Constitution is so jealous of the public rights that it expressly withholds from Congress certain powers, which otherwise would have been naturally and logically included in the general power to carry on war, how absurd is it to say that their power to carry on war includes — *without its being so mentioned* — a power so utterly foreign and irrelevant to it, and so



destructive of the principles of justice, as is the power to alter and impair men's contracts by making government notes a tender in payment of private debts.

There would be just as much reason in saying that the power of Congress to carry on war, *includes* a power to make the speeches delivered in Congress in favor of the war, a tender in payment of men's debts, as there is in saying that it includes a power to make the government notes such a tender.

It will now be taken for granted that it has been shown that neither the power "to borrow money," "to lay and collect taxes," "to regulate commerce with foreign nations, and among the several States," nor to carry on war, gives Congress any power to make government notes a legal tender in payment of private debts.

But it is said, by some of those who attempt to uphold the legal tender acts, that Congress not only have certain specific powers granted to them by the Constitution — such as the powers to borrow money, carry on war, &c. — but that they have another, and a very comprehensive, power, viz.:

5. The "power to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department thereof."

Some, or all, those persons, who have quoted this provision, as authorizing the legal tender acts, say that Congress are the sole judges of what laws are thus "necessary and proper," and have, therefore, unlimited powers to pass any laws they see fit, provided only that the laws will *tend* to carry into execution the other constitutional powers of Congress, and are not *actually forbidden* by the Constitution. Consequently they say that, as the Constitution has *not forbidden* Congress to make their notes a legal tender, and as the making them such will aid in borrowing money for the war, they necessarily have the power to make them such.

In other words, they say, in effect, (and without saying so, their argument would amount to nothing,) that all laws whatsoever — *no matter how unjust in themselves* — that will, *in any way*, serve to accomplish a constitutional end — such as borrowing money, carrying on war, &c. — are constitutional means to that end, if Congress shall decide to use them, *and if the Constitution has not forbidden those particular laws.*

In short, their argument is, that the simple injustice of the laws is, of itself, no argument against their being "necessary and proper," and, therefore, constitutional.

And they say, further, that, in the case of *McCulloch* vs. *Maryland*, the Supreme Court of the United States has declared this same doctrine.

One answer to these persons is, that the Supreme Court did not say, either expressly or impliedly, in the case of *McCulloch* vs. *Maryland*, that the injustice of a law could not be taken into consideration in determining whether it were "necessary and proper," and, therefore, constitutional — if it would but tend to accomplish a constitutional purpose, and if the Constitution had not forbidden it.

Another answer is, that if the Supreme Court had declared such a principle, they would have as much deserved to be hanged, as any criminal that ever mounted the gallows.

If all laws of Congress, *however unjust*, are nevertheless constitutional, *if not forbidden*, and if they will tend to accomplish any constitutional end, there is scarcely any conceivable injustice which Congress might not constitutionally authorize, as being "necessary and proper" means of accomplishing constitutional ends.

For example: The Constitution does not, in so many words, forbid Congress to prohibit all loaning of money to private persons, until Congress shall have borrowed all they wish, and at such rates as they please. The Constitution does not, in so many words, forbid Congress to prohibit matrimony on the part of each and every individual, until he or she shall have loaned one, five,



ten, or fifty thousand dollars to the government. It does not, in so many words, forbid Congress to cause scalding water to be thrown upon the children of all persons who refuse to lend their money to the United States. It does not, in so many words, forbid Congress to make it a criminal offence — punishable with confiscation, imprisonment, or death — to refuse to lend money to the government, in such amounts, for such times, and at such rates of interest, as Congress may prescribe, or without any interest at all. Such laws might, perhaps, aid Congress in borrowing money at lower rates than they otherwise could. But would such laws be, therefore, constitutional? And would courts have no power to declare them unconstitutional? Certainly such laws would be, not simply unjust, but also unconstitutional. And certainly it would be the duty of the courts to declare them so. But they would be no more clearly unconstitutional, than are the laws making the government notes a legal tender in payment of private debts.

The Supreme Court, in the case mentioned, did not say one word in favor of Congress having power to pass *unjust laws* — as being "necessary and proper" to accomplish constitutional ends — if they were not forbidden.

The language of the court is not, perhaps, so explicit as it ought to be. And, without ascribing to that court any immaculate purity, it may be said that their opinion is, very likely, not so explicit as it would have been, if they had supposed there would ever come after them judges so ignorant, or so corrupt, as to cite their opinion in support of a proposition so infamous.

The precise words of the court are these:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, *but consist with the letter and the spirit of the Constitution*, are constitutional."— 4 *Wheaton*, 421.

And the court said nothing inconsistent with these limitations,

viz.: that all laws, in order to be "necessary and proper" for carrying into execution the constitutional powers of Congress, must be "*appropriate*" to the end in view, and must also "*consist with the letter and the spirit of the Constitution.*"

What, then, are "the letter and spirit of the Constitution" on these particular subjects of legal tender, and the inviolability of private contracts? They are to be found in these four provisions, viz.:

1. "Congress shall have power to coin money, and regulate the value thereof, and of foreign coin."
2. "Congress shall have power to establish uniform laws on the subject of bankruptcies, throughout the United States."
3. "No State shall make any thing but gold and silver coin a tender in payment of debts."
4. "No State shall pass any law impairing the obligation of contracts."

These provisions — and there are no others conflicting with them either in letter or spirit — give us fully and distinctly both "the letter and the spirit of the Constitution," relative to legal tender, and the inviolability of contracts. What countenance do they give to any power in Congress to impair or destroy men's contracts, by authorizing them to be paid in something which the debtor never agreed to pay, nor the creditor to receive?

But there is still another mode of ascertaining whether the Constitution authorizes Congress to pass any *unjust laws*, as being "necessary and proper" for carrying into execution the powers specifically granted. And that mode is furnished by the primary rule of interpretation, which is acknowledged to be authoritative for interpreting all legal instruments whatever which courts enforce. That rule is, that an innocent meaning — a meaning favorable to justice — *and no other*, must be given to all legal instruments — whether contracts, statutes, constitutions, or treaties — whose language will possibly bear that meaning.

The Supreme Court of the United States have laid down the rule in these words:



"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." *

The same rule, in substance, but in different words, is continually laid down by courts, in their interpretations of constitutions, statutes, and contracts. Every judge, not an ignoramus, is perfectly familiar with the rule. And every judge, who ever violates the rule, is either ignorant or corrupt. The test is an infallible one.

This rule is as applicable to the interpretation of the Constitution as of any other instrument whatever; and is sufficient, of itself, to prove that the Constitution authorizes no *unjust laws* whatever (unless explicitly mentioned) as being "necessary and proper" for carrying into execution the general powers granted to the government.

Of course, the rule is sufficient to prove that the Constitution gives Congress no power to impair or destroy the obligation of men's private contracts, as a means of borrowing money a little cheaper than they otherwise could.

It is sickening to think that there can be found judges so ignorant or unprincipled, as to argue that the Constitution authorizes all manner of unjust laws, except those that it forbids. And yet this is what these judges have been necessitated to do, who have attempted to sustain the legal tender acts of Congress.

If those who framed the Constitution, had undertaken to enumerate — in order to forbid — all the unjust laws that Congress might otherwise devise and enact, under pretence of carrying out their constitutional powers, the instrument would never have been completed. They, therefore, contented themselves with framing an instrument that should grant certain important powers to the government, with "power to make all laws which shall be *necessary and proper* for carrying into execution the foregoing pow-

* *United States* vs. *Fisher et al.* 2 *Cranch*, 390.

ers," &c.; trusting that the instrument, being avowedly instituted "to establish justice, insure domestic tranquility, promote the general welfare, and insure the blessings of liberty," would find interpreters honest enough to give it the benefit of a rule that would at least forbid all injustice, that was not specially licensed by it. And this was all that was really necessary, in a legal point of view.

Nevertheless, after the Constitution had been adopted, the country — having some knowledge of the propensity of legislative bodies to disregard all constitutional and moral restraints, and to resort to all manner of injustice, under the pretext of its being "necessary and proper" for accomplishing some desirable purpose or other — did append various amendments to the Constitution, specially enumerating, and forbidding, some of those unjust laws, which it was supposed Congress would otherwise be most likely to enact.

Among the laws thus explicitly forbidden, were laws "prohibiting the free exercise of religion;" "abridging the freedom of speech or of the press;" "infringing the right of the people to keep and bear arms;" "depriving persons of life, liberty, or property, without due process of law;" "taking private property for public use, without just compensation;" and several others. Having done this, the country then — as if aware of the impossibility of enumerating all laws that ought to be forbidden, and by way of imposing a general prohibition against all unjust laws not specially enumerated — added these two comprehensive amendments, viz.:

"The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These amendments are supplementary to all other provisions, and rules of interpretation, and are, of themselves, sufficient, if



any thing more were needed, to prohibit any and every species of injustice, that is not (in the language of the Supreme Court) licensed in terms of "irresistible clearness."

The only argument, on which the legal tender acts are really attempted to be sustained, is equivalent to this: That Congress have constitutional power to license universal fraud, the violation of all faith, and the disregard of all justice, between man and man, in their private dealings, if the government can thereby borrow money cheaper than it otherwise could.

At the value at which the legal tender notes now stand in the market,* the government says to all debtors throughout the country: If you will lend to the government the money you honestly owe to your creditors, the government will license you to defraud them of some thirty or forty per cent. of what you owe them. The government holds this out as a standing offer to all debtors; and, perhaps, by so doing, it saves one, two, or three per cent. on the amount it borrows; *and perhaps not.*

If, now, the government may rightfully resort to such means as these to save a small per centage on its loans, it may, on the same principle, license those men, who lend money to the government, to commit all manner of crimes against their neighbors with impunity. †

* This is written in March, 1864.

† Having considered, in the text, as fully as was intended, the power of *Congress* in regard to legal tender, it may be necessary to say a few words in regard to the power of the *States*.

Whatever the powers or duties of the States may be on this subject, *Congress* have nothing to do with them, and can constitutionally prescribe no rules to the States, beyond what has already been shown in the text.

The *Constitution itself* forbids the States to "make any thing but gold and silver coin a tender in payment of debts."

The meaning — or at least one meaning — of this is, that when the parties to a contract have agreed upon *coin*, as the thing to be paid, the States shall not alter that agreement, and authorize the debtor to cancel his debt with something else than coin.

But the question arises, what is the power of the States in regard to contracts,

But, were it not that Congress might attempt to pass new tender laws, all the preceding argument might have been spared; because their existing laws, declaring United States notes a legal tender, are utterly void for still another reason than the want of any constitutional power on the part of Congress to make any thing but "coin" such a tender. That other reason is, *that the acts do not declare the value of the notes; or how much they shall be a tender for.* Congress seem to have taken it for

in which coin is *not* promised; but in which grain, or some other thing, is the tender agreed upon?

Here plainly the States cannot interfere to alter the tender, even to make it coin; because the States are forbidden to "pass any law impairing the obligation of contracts."

But if the debtor do not tender the thing agreed on, and tender it too within the time agreed on, the creditor is under no obligation to accept it afterwards. He may then, at his option, either sue for specific performance — that is, to compel the delivery of the identical thing promised; or he may sue, not technically for the debt itself, but for the damage resulting from the non-performance of the contract. This damage, of course, includes not only an amount equal to the debt, but also any other damage the creditor may have sustained from the non-payment of the debt at the time agreed on.

In these suits for damage, it is customary (whether law reqnires it, or not,) for the creditor to estimate his damages in coin, and to claim that they be paid in coin.

But, technically at least, debt and damage are two different things; and, therefore, there may, perhaps, be a qnestion whether, when the creditor sues in damage, and not in debt, the States are constitutionally required to canse damage to be paid in coin? or whether they may require the creditor to accept other property of the debtor at a fair valnation? This question I will not attempt to settle. The *spirit* of the constitutional provision, that "No State shall make any thing but gold and silver coin a tender in payment of debts," would obviously require, as a general rule, that damage, no less than debt, should be paid in coin. And probably the word "debts," in the provision mentioned, ought to be interpreted to include dues of all kinds. Yet possibly a narrower interpretation may be admitted. And if it may, cases may, possibly, be supposed, where, owing to a dearth of coin, occasioned by war, famine, or other great public calamity, it being practically impossible for a debtor to pay coin, a State would be justified in making other property a tender in payment of *damage*, even though the Constitntion forbids the making it a tender in payment of *debt*.

But whether a *State* has any discretion of this kind, or not, *Congress* certainly have none at all.



granted that by simply declaring that they "shall be lawful money, and a legal tender in payment of all debts public and private," they had virtually declared that these mere promises to pay dollars should be held equivalent to an equal number of real dollars. But such would not be the legal effect of the statute, even if we were to admit the constitutional power of Congress to make the notes a tender. It would still be necessary for Congress to specify precisely the *value* the notes should have, *relatively to coin.* Suppose that Congress (having power to do so) had enacted that apples, onions, and potatoes, "shall be lawful money, and a legal tender in payment of all debts public and private," it would not follow, from this form of words, that each apple, onion, or potato, was to be considered either a dollar, or the equivalent of a dollar. Neither, because Congress have declared that certain government promises to pay dollars, "shall be lawful money, and a legal tender in payment of all debts public and private," does it follow (without its being so specified) that these promises are to be considered, for the purposes of such tender, equal in value to the number of dollars promised.

But the men, who enacted these tender laws, and the judges, who have attempted to sustain them, have assumed that a promise to pay a dollar was to be considered the equivalent of a dollar, for the purposes of legal tender; when the acts themselves said nothing of the kind; and nothing from which any inference could *legally* be drawn, as to *what* value they were to have, as a tender.

The necessary consequence is that — for this reason alone, if there were no other — all the existing acts of Congress making United States notes a tender in payment of "*private* debts," are void.*

* Even if a promissory note were written, for example, (as I believe some notes are) for "*a hundred dollars payable in United States legal tender notes,*" that is not, as the makers of snch notes seem to snppose, a promise to deliver a hnndred legal tender notes for one dollar each, (or their eqnivalents,) bnt it is a promise to pay so many legal tender notes as, *at their market value,* will be eqnal

The fact that such a blunder as this should pass the ordeal of Congress, and of four or five courts, shows what brilliant and careful lawyers Congress and the courts are made up of.

in value to a hundred dollars in coin. If a man give his note for "a hundred dollars, *payable in wheat*," that is not a promise that the wheat shall be delivered *at the rate of a bushel for each dollar promised;* but it is a promise that so much wheat shall be delivered, *at its market value*, as shall make the amount paid equal in value to a hundred dollars in coin. So a promissory note for "a hundred dollars, payable in United States legal tender notes," is, in law, a promise to pay so many notes as, at their market rate, will be equal in value to a hundred dollars in coin. Men may, therefore, well be careful how they write their promissory notes, if they intend to pay them in legal tender notes.



## CHAPTER VI.

### UNCONSTITUTIONALITY OF THE NATIONAL BANK ACT.

The National Bank Act is unconstitutional in various particulars, as follows:

1. It proceeds throughout on the assumption that the notes of the government will be a legal tender in payment of all debts due to and by the banks. If, then, the Legal Tender Acts of Congress are unconstitutional, as shown in the preceding chapter, the Bank Act must fall with them; for the banks, authorized by the act, cannot sustain themselves for an hour, as practical business institutions, if liable to be sued on their notes for specie; nor can the customers of banks, if solvent men, afford to borrow depreciated currency, and give their notes for it, if they are liable to be sued on those notes for specie. The unconstitutionality of the Legal Tender Acts, therefore, settles at once all questions as to the *practicability* of the national banks.

2. The guaranty of the notes of the banks by the government is unconstitutional.

Where did Congress get their power to guarantee the notes of banks all over the country? In the same clause of the Constitution that gives them power to guarantee the notes of all the farmers, mechanics, merchants, and every body else, throughout the country; and in no other. And that clause will be found, if at all, in the Constitution manufactured by Congress themselves. It certainly exists in no Constitution that the country has ever known any thing of previous to the last Congress.

But it will be said that Congress secure the United States against loss, by requiring a deposit of their own bonds with the

United States Treasurer. Well, suppose they do. Have Congress the power to guarantee the notes of all other persons, who will deposit bonds or other property, satisfactory to Congress, to indemnify the United States against loss? If not, then they have no power to guarantee the notes of bankers on those conditions. And if any officer of the government should ever pay a dollar of the public money on any such guaranty, or if the President should suffer any officer of the government to pay a dollar on any such guaranty, he ought to be impeached. And if any judge, having jurisdiction, should refuse to enjoin the United States Treasurer against thus paying the public money, he would deserve impeachment.

The idea that Congress have any constitutional power to guarantee the notes of bankers, or of any body else, is perfect idiocy.

3. As Congress have no constitutional power to guarantee the notes of bankers, or any body else, and as such guaranty, if given, is void, they have no constitutional power to require or accept deposits of their own bonds, or of any other property, to indemnify the United States for such unconstitutional and void guaranty. Consequently all such deposits are, in law, void; and Congress have no authority to avail themselves of them. Any bonds actually deposited with the United States Treasurer, for such a purpose, are, in law, deposited with him as an individual, and not as an agent or officer of the United States; and Congress have no power to make the United States responsible for his safe keeping of the bonds. And he is in no manner responsible to the United States for the use he makes of the bonds. The owners of them may demand them at pleasure, on the ground that they were deposited for no lawful purpose, and that the United States have no lien upon them. Or the Treasurer may appropriate them to his own use, and Congress could call him to no account for so doing. The owners alone could have any action against him.

Suppose Congress were to appoint agents throughout the country, to receive deposits of property, from all persons who might



choose to make them, and thereupon to furnish, to the depositors, notes guaranteed by the United States. We all know that all such transactions would be void in law, on the grounds that Congress had no power to make any such guaranty, or consequently to receive any deposits of property to protect the United States against it. Congress would have no power to make the United States responsible for the safe keeping of such deposits; or to hold their illegal agents to any legal responsibility for the property deposited with them. These pretended agents of the United States would be, in law, the agents of the depositors alone; and the depositors could recover their deposits at pleasure, without any interference from the United States. And the case is the same with these bankers, as it would be with any other persons, farmers, merchants, or others, who might deposit property with any pretended agent of the United States, and receive in exchange notes guaranteed by the United States.

Congress have just as much constitutional power to go into a general guarantee business, guaranteeing the notes of any body, and every body, as they have to guarantee the notes of bankers.

4. The undertaking of Congress to furnish the banks with the notes they are to use, is unconstitutional. Where did Congress find their power to go into the business of bank note engraving? In the same clause of the Constitution that gives them power to go into the daguerreotype business; and in no other. Congress have just as much power to furnish the banks with banking houses, with vaults, safes, desks, and stationery; and to appoint and pay their presidents, cashiers, and clerks, as they have to furnish the bills of the banks. And the fact that Congress are to be paid for the bills they furnish, and that the business may be a profitable one, does not at all alter the case. There are, perhaps, many kinds of business that might be made profitable, if Congress were to take it into their own hands, and suppress all competition. But it does not, therefore, follow that Congress can go into such business.

Congress have just as much power to go into the business of

making farming utensils, and selling them to the farmers; of making machinery, and selling it to manufacturers; of making locomotives, and selling them to rail-road companies, as they have to go into the bank note business.

5. Congress have no power to incorporate these banking companies, or give them any corporate privileges, or hold them to any corporate responsibility whatever.

As long ago as 1819, in the case of *McCulloch* vs. *Maryland*, (4 Wheaton's Reports,) the Supreme Court of the United States gave an opinion, which fully covers the Bank Act of Congress, and declares it unconstitutional. In that case the court held that the law incorporating the old bank of the United States *was* constitutional. But they declared it so, *distinctly and solely*, on the ground that the bank was a necessary, or at least a proper and useful, agency to be employed in keeping and disbursing the public monies. And those services the bank was required, by its charter, to perform, free of expense to the government; transmitting money from one part of the country to another, without any charge for exchange.*

Thus the court say:

"Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, *that* raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" Page 408.

* Section 15 of the charter is in these words: — "That during the continuance of this Act, and whenever required by the Secretary of the Treasury, the said corporation shall give the necessary facilities for transferring the public funds from place to place, within the United States, or the Territories thereof, and for distributing the same in payment of the public creditors, without charging commissions or claiming allowance on account of difference of exchange, and shall also do and perform the several and respective duties of the Commissioners of loans for the several States, or any one or more of them, whenever required by law."



"It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to *imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance.* But it is denied [by the counsel opposed to the bank] that the government has its choice of means; or that it may employ the most convenient means, *if to employ them, it be necessary to erect a corporation.*

"On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty," &c. Page 409.

"If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, *if required for its fiscal operations.* To use one must be within the discretion of Congress, if it be an appropriate mode of executing the powers of the government. That it is a convenient, a useful, an essential instrument *in the prosecution of its fiscal operations*, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the Confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers to obtain the advantages of a bank; and our own legislation attests the universal conviction of the utility of this measure." Page 422–3.

By the "fiscal operations" of the government, the court must be supposed to mean simply the keeping and disbursing of the public money; for those were the only "fiscal operations" the bank was required, by its charter, to perform for the government; and they were also the only "fiscal operations," *that were specially pointed out by the court*, as being such as the bank *could* perform as the agent of the government. The bank was, therefore, held constitutional solely upon the ground of its being

a proper and useful agent of the government for keeping and disbursing the public money.

The point of the opinion was, that, if the government needed an agency of that kind, for executing any of its constitutional powers, it had a right to create one by an act of incorporation.

On this principle, if the government were to make a contract, with a body of men, to carry the mail, or furnish supplies for the army, it would have a right to incorporate them.

That was the *only* ground on which the court held that that bank charter was constitutional. The whole argument of the court proceeded upon the ground that Congress had no power to grant charters of incorporation, except to companies whose services were needed *by the government itself*, in performing some one or other of its constitutional duties.

If that opinion of the court was correct, it follows that the present Bank Act of Congress is *clearly unconstitutional;* inasmuch as the banks, authorized by it, are, in no sense, agencies of the government; and are not required, by the act, to perform any services whatever for the government. And Congress, therefore, have no more power to incorporate them, than they have to incorporate hospitals, schools, churches, rail-road, insurance, manufacturing, and mining companies.

It is worthy of notice, too, that notwithstanding the Supreme Court held that the charter of the old bank was constitutional, probably more than half the *people* of the United States have always believed it unconstitutional.

And it *was* unconstitutional, in so far as it licensed the stockholders to contract debts among the people, in their corporate capacity, and under a limited liability. Congress have no authority to pass any law impairing or limiting the obligation of men's contracts, or screening their property from liability for debt, unless it be a "uniform law on the subject of bankruptcies." A bank charter does not come within that definition; and therefore a bank charter is unconstitutional, in so far as it attempts to exempt the corporators from their liability as partners, no matter what services the bank may perform for the government.



The argument of the court does not at all sustain the conclusion that Congress have any such power. That argument was that Congress had authority to "pass all laws that were necessary and proper for carrying into execution" the substantive powers of the government; and that, therefore, if a corporation were a convenient and proper agent to be employed in keeping and disbursing the revenues, Congress had a right to create such an agent. That is to say, if Congress wished to contract with a company of men to perform a certain service for the government, they had power to recognize them as a corporation, *so far as the performance of that particular service was concerned.* This all looks reasonable enough; and it is probably correct law that Congress may incorporate a company, and authorize them to do, in their corporate capacity, *any thing which they are to do for the government.* And Congress may undoubtedly limit, at discretion, the liability which the stockholders shall incur *to the government.* And the company may probably, in their corporate capacity, buy and sell bills of exchange, so far as it may be convenient to do so, in transmitting the public funds from one point of the country to another; because bills of exchange are the most usual, safe, cheap, and expeditious mode of transmitting money.

But all this is a wholly different thing from a charter authorizing the company, not only to perform these services for the government, but also to carry on the trade of bankers, in all its branches, and contract debts at pleasure *among the people*, without being liable to have payment of their debts enforced, either according to the natural obligation of contracts, or the laws of the States in which they live.

The argument of the court does not justify the grant of any such authority to the company. It goes only to the extent of authorizing the company to use their corporate rights in doing the business of the government alone; for the court say, that if

an agent be needed to perform certain services for the government, the government may create an agent for that purpose. The court admit also, that the need or utility of such an agent for carrying into execution the powers of the government, is the only foundation of the authority to create the agent. This principle clearly excludes the idea of creating the corporation for any other purpose; and of course it excludes the idea of giving it any other corporate powers than that of performing the services required of it by the government. Now, in order that the company may keep and disburse the revenues (which were the only services the government required, or which the opinion of the court contemplated that the bank would perform) it plainly was not at all necessary that they should have the privilege of contracting debts among the people, as bankers, in their corporate capacity, or under a limited liability, or with an exemption from the operation of those State laws, to which all other citizens are liable.

If Congress may, by a charter, protect the private property of a company of bankers, from liability for their banking debts, according to the laws of the States, merely because, in addition to their banking business, they perform for the government the service of keeping and disbursing its revenues, then, by the same rule, Congress may by law forbid the State governments to touch the private property of any Collector of the Customs, or of any clerk in the Custom House, for the purpose of satisfying his debts. And the result of this doctrine would be, that every person, who should perform the slightest service of any kind for the government, might be authorized by Congress to contract private debts at pleasure among the people, and then claim the protection of Congress, not merely for his person, but also for his property, against the State laws which would enforce the obligation of his contracts. Every postmaster, for instance, and every mail contractor might have this privilege granted to them as part consideration for their services; for Congress have as much power to grant this privilege to postmasters and mail carriers, in consideration of the particular services they perform for the government, as they have to grant it to a company of bankers, as a consideration for their keeping and disbursing the revenues.



But suppose that Congress should enact that the private property of all officers and agents of the government, and all persons having contracts to furnish supplies to the government, should be exempt from liability for debt. Would there not be one universal outcry that such a law was unconstitutional? Certainly there would. But it would be no more unconstitutional than a law exempting the private property of a company of bankers, on account of their being the agents of the government for keeping and disbursing its revenues.

*In this particular*, then, the charter of the old bank was unconstitutional. And if that charter was unconstitutional, still more, if possible, are the charters of the present banks unconstitutional, inasmuch as these banks perform no services at all for the government. They *entirely lack* the *only* element that was supposed, by the court, to make the charter of the old bank constitutional.

If the Constitution itself gives Congress no power to incorporate banks, their law, for that purpose, cannot be made constitutional by the consent of the State legislatures. The constitutional powers of Congress, within a State, cannot be increased by the consent of the State legislature. If they could, the general government might have much greater powers in one State than in another. It might increase its powers in each State just according as it could make bargains with the legislature of the State. In fact, a State legislature might, by a simple vote, surrender all the constitutional powers of the State to the general government.

If the Bank Act be unconstitutional, the banks can have no corporate existence under it; and can neither sue, nor be sued, by their corporate names. The bankers can sue and be sued, if at all, only as partners; and they will be liable as partners for all debts of the banks.

If the act be unconstitutional, then all its provisions for pre-

venting frauds on the part of the bankers, are void, and the directors can commit all manner of frauds against both bill holders and stockholders, and no redress can be had, unless under the laws of the States relative to swindling; and even that redress would most likely prove of no practical value.

The directors, having obtained their bills of the United States Treasurer, by a deposit of bonds, would loan the bills to themselves, or to men confederated with them. They would then demand the bonds of the Treasurer, on the grounds that the Act was unconstitutional; that the United States were not holden for the bills, and had no lien upon the bonds, and were not even responsible for the safe keeping of the bonds. The Treasurer, unless he wished to embezzle the bonds himself, would give them up. If he should not give them up willingly, suit would be brought to compel him.

Having got the bonds, the directors would dispose of them, and put the proceeds in their pockets.

Having thus embezzled the capital and assets of a bank, if they should be indicted under the bank act itself, they would plead that the act was unconstitutional, and that there was, in law, no corporation. After one, two, or three years delay, that plea would be sustained, unless the court should overrule the opinion in *McCulloch* vs. *Maryland*, which is not to be expected.

On the other hand, if they should be indicted under the *State* laws, they would plead that the bank act *was* constitutional; and that they were liable only under that act. In this way they would tie up the case with law questions for as long a period as possible.

And whether indicted in the United States or in the State courts, they would make all possible delay, under pretence of procuring testimony as to their having made loans in good faith, but on securities which unexpectedly proved worthless. And before a decision should be reached, the funds would have all gone to the four winds.

The result would be that neither the stockholders nor the bill



holders would ever obtain any redress of any practical value. If the bill holders should ever obtain any redress, they would obtain it only by suing those innocent stockholders, who would have already been swindled out of their capital.

Nobody but dupes and swindlers would ever think either of investing in such banks, or of taking their bills.

6. Even if the Act in general were constitutional, the sixty-first section, declaring that any bank, incorporated under State laws, may "become an association under the provisions of this act," provided "the owners of two thirds of the capital stock of such banking corporation or association" shall consent to the change, would be unconstitutional.

When a body of men form themselves into a banking company, under a State charter, they legally enter into a *contract* with each other, that the capital, thus invested, shall be held and managed under that charter; and of course under that charter alone. For "the owners of two thirds the capital stock" of such a bank to divert that capital from the uses agreed upon, and invest it in banking under a charter granted by Congress, to which all the stockholders have not agreed, *is a breach of contract, and a breach of trust*, as against all non-concurring stockholders. And Congress have no more authority to authorize such a breach of contract, or trust, and such a diversion of the capital from the objects agreed upon, than they have to authorize "the owners of two thirds the capital stock" of a manufacturing company, an insurance company, or a church, to divert the whole capital from the objects for which it was contributed, and appropriate it to the establishment of a race course, a theatre, or a distillery.

And if the directors of a State bank should thus divert its funds, they would be liable, possibly to indictment, and certainly in civil actions for damages, on the part of the non-concurring stockholders.

There are some other provisions in the act, richly worthy of notice, as exhibiting the legal acumen, and the business sagacity,

of the Congress that passed it. But space cannot here be spared to present them.

The bill now before Congress,* (and which is likely to pass, as being necessary to force the National Bank Act upon the country,) prohibiting, after one year, all banking, (issuing bills for circulation,) except by bankers, "authorized thereto by act of Congress," is not merely unconstitutional; it is villainous. The Constitution does not require the people of this country to get *permits* from Congress for carrying on any innocent and lawful business. Nor does it give Congress any power to suspend all industry and commerce, except by persons "authorized thereto by act of Congress." If the Constitution did this, then, instead of spending so much blood and treasure to sustain it, we ought, (if it could not be otherwise abolished,) to spend the same blood and treasure to overthrow it. Congress have just as much constitutional power to say that no person shall *breathe* in this country, "unless authorized thereto by act of Congress," as they have to say that no man shall carry on the business of a banker, or any other innocent and lawful business, without being first licensed by act of Congress.

Congress have no more constitutional power to prohibit banking, than they have to prohibit farming, manufacturing, or commerce. They have no more power to prohibit banking, than they have to prohibit all the industry and commerce that are carried on by means of bank credits and currency. They have no more constitutional power to say that the people shall have no currency, except such as Congress shall have specially licensed, than they have to say that they shall have no farming utensils, no cattle, horses, sheep, pigs, or poultry, that they shall raise no crops, build no houses, eat no food, wear no clothing, except such as Congress shall have specially licensed. This proposition is so obviously and self-evidently true, that it would be wasting words and paper to expend any argument upon it.

* Introduced April 12.



But even if this bill should be considered constitutional, it would have no effect to prohibit the author's system of banking; because that has been already licensed by act of Congress — that is, by the copyright act. And that act is unquestionably *constitutional;* for it is *expressly* authorized by the Constitution. That license, therefore, must stand good, unless Congress commit a deliberate breach of faith. And even if Congress were to commit a deliberate breach of faith, by prohibiting the author's system, it would still be a question whether rights once vested and guaranteed, by a law that was unquestionably constitutional, could be destroyed by an act of wanton perfidy and spoliation? Whether that would not be "depriving a person of property without due process of law?" And whether it were not therefore expressly forbidden by the Constitution?

The other section of the same bill, imposing a discriminating tax of one-fourth of one per cent. a month upon all bills in circulation, issued by banks or bankers not "thereto authorized by act of Congress," is equally unconstitutional and villainous with the section that is to prohibit all banking after one year. Inasmuch as Congress have no power to require the people to get permits from Congress for carrying on any innocent and lawful business, they have no power to impose a discriminating tax upon those who do not get such permits.

If Congress can impose a discriminating tax upon all who do not get permits from Congress to carry on their business, all the industry and commerce of the country may be brought under the arbitrary control of Congress; and permits to carry them on may be given out as privileges only to Congressional favorites.

There is no reason why bankers should be singled out for all this unconstitutional, absurd, tyrannical, and villainous legislation. By furnishing credit and currency to keep industry and commerce in motion, they do more for the wealth of the country than any other equal number of men, unless it be inventors. Their business is intrinsically as innocent and lawful as that of any other class of persons. The only complaints that can be made against

them, are, that there are not half enough of them, and that their systems of banking are not good ones. But these faults are not the faults of the bankers themselves, but of the laws that limit the number of bankers, and prohibit the adoption of other and better systems.

All the laws that are necessary in regard to banking, are such as are applicable to all other business, viz.: laws giving inventors the benefit of their inventions, and laws compelling the bankers to fulfil their contracts, and punishing their frauds and crimes. Such laws as these will give us the benefit of the best systems of banking that men can invent; and those are the best that, in the nature of things, we can have.



## CHAPTER VII.

### EXCHANGES UNDER THE AUTHOR'S SYSTEM.

It will be very easy, under the author's system, to give the currency a uniform value in all parts of the country; as follows:

In the first place, where the capital shall consist of mortgages, it will be very easy for all the banks, in any State, to make their solvency known *to each other*. There would be so many banks, that some system would naturally be adopted for this purpose.

Perhaps this system would be, that a standing committee, appointed by the banks, would be established, in each State, to whom each bank in the State would be required to produce satisfactory evidence of its solvency, before its bills should be received by the other banks of the State.

When the banks, or any considerable number of the banks, of any particular State — Missouri for example — shall have made themselves so far acquainted with each other's solvency, as to be ready to receive each other's bills, they will be ready to make a still further arrangement for their mutual benefit, viz.: to unite in establishing one general agency in St. Louis, another in New Orleans, another in Chicago, another in Cincinnati, another in New York, another in Philadelphia, another in Baltimore, and another in Boston, where the bills of *all* these Missouri banks shall be redeemed. And thus the bills of all Missouri banks, that belonged to the Association, would be placed at par at all the great commercial points.

Each bank, belonging to the Association, might print, on the back of its bills, "*Redeemable at the Missouri Agencies, in St. Louis, Chicago, Cincinnati,*" &c.

In this way all the banks of each State might unite to establish agencies in all the large cities for the redemption of their bills.

The banks might safely make *permanent* arrangements of this kind with each other; because the *permanent* solvency of all the banks might be relied on.

The permanent solvency of all the banks might be relied on, because, under this system, a bank, (whose capital consists of mortgages,) once solvent, is necessarily forever solvent, unless in contingencies so utterly improbable as not to need to be taken into account. In fact, in the ordinary course of things, every bank would be growing more and more solvent, because in the ordinary course of things, the mortgaged property would be constantly rising in value, as the wealth and population of the country should increase. The exceptions to this rule would be so rare as to be unworthy of notice.

There is, therefore, no difficulty in putting the currency, furnished by each State, at par throughout the United States.

At the general agencies in the great cities, the redemption would doubtless generally be made in specie *on demand*, because, at such points, especially in cities on the seaboard, there would always be an abundance of specie in the market as merchandize; and it would, therefore, be both for the convenience and interest of the banks to redeem in specie on demand, rather than by a conditional transfer of a portion of their capital, and then paying interest on that capital until it should be redeemed with specie.

Where rail-roads were used as capital, all the banks in the United States could form one Association, of the kind just mentioned, to establish agencies at all the great commercial points, for the redemption of their bills.

Where United States Stocks should be used as capital, the same system could be safely adopted, for redeeming their currency in all the great cities, as where mortgages were the capital; because, although United States stocks are below par of specie, yet every bank, using them as capital, could know that the currency of every other bank of the same kind was worth *at least as much* as the stocks it should represent. Since there would be always a dollar of the stocks in bank, for every dollar of currency that could be put in circulation, the banks could always know the lowest possible value of each other's currency, by knowing the market value of the stocks it should represent.



The currency might sometimes be worth *more* than the capital, dollar for dollar; because, although the capital (U. S. stocks) should be below par of specie in the market, yet the bank might have assets (in the shape of notes discounted, and profits accumulated) equal, or more than equal, to its capital. And these assets must all be exhausted, in the redemption of its bills with specie, before its bills could be worth less than par of specie. But suppose all these assets exhausted, the currency would still be worth *as much as the capital*, dollar for dollar; because the capital itself can be demanded for the currency, if specie be refused. Although, therefore, the currency of banks, based upon United States stocks, might be sometimes worth *more* than the stocks, (when these were below par of specie,) it can never be worth *less* than the stocks. And as the market value of the stocks would be always known, the lowest possible value of the currency (for the time being) could always be known. The bills of a bank, based upon United States stocks, would, therefore, be worth, all over the country, at least as much as the stocks.

It is doubtful, however, whether currency of that kind, always liable to be below par of specie, and variable at that, could be made a desirable one. It would, therefore, probably not be expedient to use United States stocks as banking capital, on the plan of issuing a dollar of currency for a dollar of stocks. The better way of using the stocks as banking capital, while they are so much below par of specie, would probably be to put in two dollars of bonds to make one of banking capital. This would make the bank capital worth a little more than par of specie; and would, of course, make the currency worth par of specie.

Using United States stocks in this way — that is, using two

dollars of bonds to make one of banking capital — the United States bonds now extant, and those hereafter to be issued, would probably afford a basis for as much currency as the banks could keep in circulation; especially if mortgages or rail-roads should be used as a basis in competition with the bonds.

If, however, the stocks should ever rise to par, and stand there permanently, and it should be found desirable to issue more currency upon them, the banks using two dollars of bonds for one of capital could be dissolved, and new ones formed, that should use the stocks at their par value, and issue currency upon them accordingly.

# APPENDIX.

## THE AUTHOR'S COPYRIGHT.

INASMUCH as some persons have suggested that the author's copyright of his Articles of Association may be evaded, he has thought proper to exhibit some of the obstacles, both practical and legal, in the way of any such evasion.

The practical obstacles — or at least some of them — are shown in the following "NOTE," repnblished from his "NEW SYSTEM OF PAPER CURRENCY."

## NOTE.

The snbscriber believes that the right of property in ideas, is as valid, in the view both of the Common and constitutional law of this country, as is the right of property in material things; and that patent and copyright laws, instead of superseding, annnlling, or being a substitute for, that right, are simply aids to it.

In publishing this system of Paper Currency, he gives notice that he is the inventor of it, and that he reserves to himself all the exclusive property in it, which, in law, equity, or natural right, he can have; and, especially, that he reserves to himself the exclusive right to furnish the Articles of Association to any Banking Companies that may adopt the system.

To secure to himself, so far as he may, this right, he has drawn up and copyrighted, not only such general Articles of Association as will be needed, bnt also such other papers as it will be necessary to use separately from the Articles.

Even should it be possible for other persons to draw up Articles of Association, that wonld evade the subscriber's copyright, banking companies, that may adopt the system, will probable find it for their interest to adopt also the subscriber's Articles of Association: for the reason that it will be important that Companies should all have Articles precisely, legally, and verbally alike. If their Articles should all be alike, any legal qnestions that may arise, when settled for one Company, would be settled for all.

Besides, if each Company were to have Articles different from those of others, no two Companies could take each other's bills on precisely eqnal terms; because their legal rights, as bill holders, under each other's Articles, would not be precisely alike, and might be very materially different.

Furthermore, if each Company were to have Articles of Association peculiar to itself, one Company, if it could take another's bills at all, could not safely take them until the former had thoroughly examined, and satisfactorily ascertained, the *legal* meaning of the latter's Articles of Association. This labor among banks, if Companies should be numerous, would be intolerable and impossible. The necessity of studying, understanding, and carrying in the mind, each other's different Articles of Association, would introduce universal confusion, and make it impracticable for any considerable number of Companies to accept each other's bills, or to coöperate in furnishing a currency for the public. Each Company would be able to get only such a circulation as it could get, without having its bills received by other banks. But if all banks have precisely similar Articles of Association, then one Company, so soon as it understands its own Articles, understands those of all other Companies, and can exchange bills with them readily, safely, and on precisely equal terms.

Moreover, if each separate Company were to have its peculiar Articles of Association, it would be wholly impossible for *the public* to become acquainted with them all, or even with any considerable number of them. It would, therefore, be impossible for the public to become acquainted with their legal rights, as bill holders, under all the different Articles. Of course they could not safely accept the currency furnished by the various Companies. But if all the Companies should have Articles precisely alike, the public would soon understand them, and could then act intelligently, as to their legal rights, in accepting or rejecting the currency.

The subscriber conceives that the Articles of Association, which he has drawn up, and copyrighted, are so nearly perfect, that they will never need any, unless very trivial, alterations. In them he has intended to provide so fully for all exigencies and details, as to supersede the necessity of By-Laws. This object was important, not only for the convenience of the Companies themselves, but because any power, in the holders of Productive Stock, to enact By-Laws, might be used to embarrass the legal rights of the bill holders under the Articles of Association.

Besides, as the holders of Productive Stock are liable to be continually changing, any power, in one set of holders, to establish By-Laws, would be likely to be used to the embarrassment, or even injury, of their successors.

It is obviously important to all parties, that the powers of the Trustees, and the rights of all holders, both of Productive and Circulating Stock, should be legally and precisely fixed by the Articles of Association, so as to be incapable of modification, or interference, by any body of men less than the whole number interested.

LYSANDER SPOONER.

*Boston*, 1861.



Some of the *legal* obstacles, in the way of an evasion of the author's copyright, will be seen in the following Acts of Congress, and in the subjoined legal authorities as to what constitutes an infringement of copyright.

Act of Congress of 1819, Chap. 19, Sec. 1, authorizes the courts to grant injunctions against infringers.

Act of Congress of 1831, Chap. 16, Sec. 6, provides for the punishment of infringers as follows: —

1. "Such offender shall forfeit every copy of such book to the person legally, at the time, entitled to the copyright thereof."

Under this clause of the Act infringers would forfeit not merely those copies of their Articles of Association, which they should design to circulate, for the information of other banks and the public, but also those copies which should *bear their own signatures, and which alone should constitute them a company.* The forfeiture of these latter copies would dissolve the company; because there would then be no legal evidence of the existence of the company.

The company being dissolved, the holders of the currency would have no redress, except by suing the bankers for fraud.

The infringers would also forfeit their records of the transfers of the capital stock of the company; because the forms of transfer were necessarily peculiar, and are separately copyrighted, as well as included in the general copyright of the Articles of Association. By this forfeiture the legal evidence of the ownership of the stock would be lost.

The bills of the banks — that is, those found in the hands of the bankers, or of any other persons who should have taken them knowing of the infringement — would be forfeited; for the bills were necessarily peculiar, and are separately copyrighted.

The same would be true of copies of all the other papers that are separately copyrighted, comprising ten in all.

2. "Such offender * * shall also forfeit and pay fifty cents for every such *sheet* which may be found in his possession, either printed, or printing, published, or exposed to sale, contrary to the intent of this act, the one moiety thereof to such legal owner of the copyright as aforesaid, and the other to the use of the United States, to be recovered by action of debt in any court having competent jurisdiction thereof."

Under this clause of the Act, the infringers will be liable to pay fifty cents for each "sheet" of all copies of the Articles of Association, and also for each *sheet* of the papers separately copyrighted, such as the bills, certificates of stock, transfers, &c., &c. And each separate bill, certificate of stock, or other paper, however small, is a "sheet," within the meaning of this Act.

The following authorities are given to show what constitutes an infringement, (or "*piracy*," as the infringement of a copyright is technically called).

## LEGAL AUTHORITIES RELATIVE TO COPYRIGHT.

1. "Where the adoption and use of the matter of an original author, whose work is under the protection of copyright, is direct and palpable, and nothing new is added but form or dress, or an immaterial change of arrangement, the law will treat the matter as merely colorable, and will stamp it with the character of piracy"—[infringement].—*Curtis on Copyright*, 188.

2. "Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the piracy."—*Curtis on Copyright*, 253.

3. "Where the resemblance does not amount to identity of parallel passages, the question [of piracy, or infringement] becomes, in substance, this—whether there be such a similitude and conformity between the two books, that the person who wrote the one must have used the other as a model, and must have copied or imitated it? In these cases the piracy is to be detected, through what have been called colorable alteration, and servile imitation."—*Curtis on Copyright*, page 256.

4. "If the court can see proof that the defendant had the work of the plaintiff before him, and used it as a model for his own, in copying and imitating it, without drawing from common sources, or common materials, it will hold the resemblances to be not accidental, and not necessary, notwithstanding the alterations and disguises that may have been introduced."—*Curtis on Copyright*, page 259.

5. "It is not necessary, to amount to piracy, that one work should be a copy of the other, and not an imitation. There may be a close imitation, so close as to be a mere evasion of the copyright, without being an exact and literal copy."—*Curtis on Copyright*, page 259.

6. "The general doctrine of the law is, that none are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still entitled to the protection of Copyright."—*Curtis on Copyright*, page 264.

7. "In the analagous case of patent rights, the subject of an existing and valid patent cannot be taken as the superstructure of an improvement. If the improvement cannot be used, without the subject of an existing grant, the inventor of the improvement must wait until the grant has expired. But he may take out a patent for the improvement by itself, and sell it."—*Curtis on Copyright*, page 264, note.

8. Judge Thompson (U. S. Court) said:

"The law was intended to secure to authors the fruits of their skill, labor, and genius, for a limited time; and if, in this instance, the defendant had availed himself of the surveys of the plaintiff in compiling his chart, the plaintiff was entitled to a verdict."—*Blunt* vs. *Patten*, 2 *Paine's Circuit Court Reports*, p. 396.



9. Lord Mansfield said:

"The Act that secures copyrights to authors, guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subjects. As in the case of histories and dictionaries."—*Quoted in note to Blunt* vs. *Patten*, 2 *Paine's C. C. R.*, page 402.

10. In regard to the copyright of a musical composition, Judge Nelson (U. S. Court) said:

"The composition of a new air or melody is entitled to protection; and the appropriation of the whole, *or of any substantial part of it*, without the license of the author, is a piracy [infringement]. * * If the new air be substantially the same as the old, it is no doubt a piracy. * * The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment. The musical composition, contemplated by the statute, must doubtless be substantially a new and original work; and not a copy of a piece already produced, *with additions and variations, which a writer of music with experience and skill might readily make.* Any other construction of the Act would fail to afford the protection intended to the original piece from which the air is appropriated. The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copyright would be worthless."—*Jolie* vs. *Jaques et al*, 1 *Blatchford's Circuit Court Reports*, pp. 625-6.—*U. S. Digest for* 1852,—*Title Copyright.**

11. In the case of Folsom et al, *vs.* Marsh et al, Judge Story said:

"It is certainly not necessary, to constitute an invasion of copyright, that the whole work should be copied, or even a large portion of it, in form or in substance. If so much is taken that the value is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author; and it is no defence that another person has appropriated a part, and not the whole, of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright, or not. It is often affected by the value of the materials taken, and the importance of it to the sale of the original work. Lord Cottenham, in the recent cases of Bramhall *vs.* Halcomb, (3 Mylne and Craig, 737-738,) and Saunders *vs.* Smith, (3 Mylne and Craig, R. 711, 736, 737,) adverting to this point, said, 'When it comes to a question of quantity, it must be

* On the point of title, the court say:—"A copyright is given for the contents of a work, not for its mere title. There need be no novelty in that which is but an appendage."—Page 627.

very vague. One writer might take all the vital part of another's book, though it might be but a small portion of the book in quantity. It is not only quantity, but value, that is always looked at. It is useless to refer to any particular cases, as to quantity.' In short, we must often, in deciding questions of this sort, look to the nature and object of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original works."—2 *Story's C. C. R.* p. 115.—*Curtis on Copyright*, p. 248, note.

12. Extracts from Judge Story's opinion in the case of Emerson *vs.* Davies, 3 Story's Circuit Court Reports, p. 768.

### Head Notes to the Case.

1. "Any new and original plan, arrangement, or combination of materials, will entitle the author to a copyright therein, whether the materials themselves be new or old."

2. "Whoever by his own skill, labor, and judgment, writes a new work, may have a copyright therein, *unless* it be directly copied, or *evasively imitated* from another work."

4. "To constitute a piracy [infringement] of copyright, it must be shown that the original work has been either substantially copied, *or has been so imitated as to be a mere evasion of the copyright*."

### Extracts from the Opinion of Story, Judge.

"An author has as much right in his plan, and in his arrangements, and in the combination of his materials, *as he has in his thoughts, sentiments, opinions, and in his modes of expressing them.* The former, as well as the latter, may be more useful, or less useful, than those of another author; but that, although it may diminish or increase the relative values of their works in the market, *is no ground to entitle either to appropriate to himself the labor or skill of the other, as embodied in his own work.*" Page 782.

"No person had a right to borrow the same plan, and arrangement, and illustrations, and servilely copy them into any other work." Page 783.

"If the defendant, Davies, had before him, at the time, the work of the plaintiff, and used it as a model for his own plan, arrangement, examples, and tables, then I should say, following the doctrine of Lord Ellenborough, in Roworth *vs.* Wilkes, that it was an infringement of the plaintiff's copyright, *notwithstanding the alterations and disguises in the forms of the examples and the unit marks.*" Page 792.

"A man has a right to the copyright of a map of a State or country, which he has surveyed, or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. Another man may publish another map of



the same State or country, by using the like means or materials, and the like skill, labor, and expense. *But then he had no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is downright piracy;* although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other. He, in short, who, by his own skill, judgment, and labor, writes a new work, and does not merely copy that of another, is entitled to a copyright therein: *if the variations are not merely formal and shadowy*, from existing works." Page 781.

"In Trusler *vs.* Murray, (1 East R. p. 362, note,) Lord Kenyon put the point in the same light, and said: 'The main question here, was, *whether, in substance, the one work is a copy and imitation of the other.* * * The same doctrine was recognized by the Court of King's Bench, in Cary *vs.* Longman & Rees (1 East, p. 358); and it was finally acted on in Mathewson *vs.* Stockdale (12 Vesey, page 270), and Longman *vs.* Winchester (16 Vesey, p. 269), and Wilkins *vs.* Aiken (17 Vesey R., p. 422, 424, 425), in the Court of Chancery. So that, I think, it may be laid down as the clear result of the authorities in cases of this nature, *that the true test of piracy* [infringement] *or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof;* or whether his work is the result of his own labor, skill, and use of common materials, and common sources of knowledge, open to all men, and the resemblances are either accidental, or arising from the nature of the subject. In other words, *whether the defendant's book is, quoad hoc*, a servile *or evasive imitation of the plaintiff's work*, or a *bona fide* original compilation from other common or independent sources." Page 793.

"The change of costume of the fencing figures, in the case before Lord Ellenborough, was treated as a mere evasion." Page 794.

"To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion, which operates injuriously to the copyright of the plaintiff." Page 795.

He quotes Lord Eldon, as saying:

"If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame." Page 796.

"It has been said that, to amount to piracy [infringement] the work must be a copy, and not an imitation. That, as a general proposition, *cannot be admitted.* It is true the imitation may be very slight and shadowy. But, on the other

hand, it may be very close, *and so close as to be a mere evasion of the copyright*, although not an exact and literal copy." Page 797.

"If it substantially includes the essential parts of the plaintiff's plan, of his arrangement, examples, and tables, *so as to supersede* the work of the plaintiff, it is a violation of his copyright." Page 797.

13. In the case of Webb, et al, *vs.* Powers, et al, Judge Woodbury said:

"The leading inquiry then arises, which is decisive of the general equities between these parties, whether the book of the defendant's taken as a whole, is substantially a copy of the plaintiff's? whether it has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers, by introducing no considerable new matter, or little or nothing new, except colorable deviations."—2 *Woodbury & Minot's Circuit Court R.*, page 514.

END OF
TITLE